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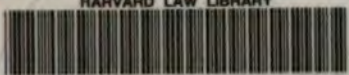
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF CASES AND PRINCIPAL MATTERS.

BY MICHAEL C. KERR,
OFFICIAL REPORTER.

VOL. XXI.

**CONTAINING THE CASES DECIDED AT THE NOVEMBER TERM, 1863,
TOGETHER WITH CERTAIN CASES DECIDED AT PRE-
VIOUS TERMS, AND HELD OVER ON PETITION
FOR REHEARING AND OTHERWISE.**

INDIANAPOLIS, IND.:
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1864.

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In the Clerk's office of the District Court of the United States, within and for
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Rec June 14, 1864

J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD EMBRACED IN THIS VOLUME.

ANDREW DAVISON,
JAMES L. WORDEN,
JAMES M. HANNA,
SAMUEL E. PERKINS.

Judge DAVISON was Chief Justice at the November Term,
1863.

JOHN P. JONES, Clerk of Supreme Court.

HENRY H. NELSON, Sheriff of Supreme Court.

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DURING THE

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JOSEPH W. CHAPMAN,	Oct. 27, 1858...	1...	Madison.
GEORGE A. BICKNELL,	Dec. 24, 1858...	2...	New Albany.
MICHAEL F. BURKE,	Nov. 6, 1858...	3...	Washington.
REUBEN D. LOGAN,	Nov. 7, 1858...	4...	Rushville.
FABIUS M. FINCH,	Oct. 24, 1859...	5...	Franklin.
SOLOMON CLAYPOOL,	Nov. 6, 1858...	6...	Terre Haute.
JOSEPH S. BUCKLES,	Oct. 26, 1858...	7...	Muncie.
JOHN M. COWAN,	Nov. 1, 1858...	8...	Frankfort.
ANDREW L. OSBORN,	Nov. 16, 1857...	9...	LaPorte.
EDWARD R. WILSON,	Oct. 25, 1858...	10...	Fort Wayne.
HORACE P. BIDDLE,	Oct. 26, 1860...	11...	Logansport.
CHARLES H. TEST,	Oct. 27, 1857...	12...	Lafayette.
JEHU T. ELLIOTT,	Oct. 21, 1861...	13...	New Castle.
WILLIAM F. PARRETT,	Nov. 5, 1859...	15...	Booneville.

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OF THE

COURTS OF COMMON PLEAS

IN THE

STATE OF INDIANA,

DURING THE :
PERIOD EMBRACED IN THIS VOLUME.

Names.	Date of Commission.	Dist.
JOHN PITCHER,.....	Oct. 25, 1860.....	1
RICHARD A. CLEMENTS,.....	Oct. 26, 1860.....	2
DAVID T. LAIRD,.....	Nov. 1, 1862.....	3
AMOS LOVERING,.....	Oct. 25, 1860.....	4
FRANCIS ATKINSON,.....	Oct. 26, 1860.....	5
JEREMIAH M. WILSON,.....	Oct. 26, 1860.....	6
BEATTIE McCLELLAN,.....	Nov. 1, 1862.....	7
GEORGE A. BUSKIRK, ..	Oct. 26, 1860.....	8
FREDERICK T. BROWN,.....	Oct. 26, 1860.....	9
CHAMBERS Y. PATTERSON,.....	Oct. 20, 1860.....	10
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ATTORNEYS

ADMITTED AT NOVEMBER TERM, 1863.

**NATHAN W. GORDON,
THOMAS C. WHITESIDE,
EDGAR HAYMOND,
THURMAN C. ANNABAL,
JOSEPH CLAYBAUGH,
MARTIN FERRIS,
JOHN D. HAYNES,
SAMUEL BRYAN,
MARSHALL A. MOORE,
JOHN M. JOHNSTON,
WASHINGTON GRIFFIN,
GEORGE C. CLARK,
DAVID M. JONES.**

C A S E S
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1863, IN THE
FORTY-SEVENTH YEAR OF THE STATE.

SKEEN *v.* MONKEIMER.

PROVOST MARSHAL—ARREST.—A deputy Provost Marshal, directed by his superior military officer to arrest and send to headquarters all persons engaged in stealing, concealing, or preventing the delivery of any Government property, or any property to which the *United States* have any just claim, in any county of this State, can not, upon his own motion, and without proper legal process under the laws of *Indiana*, arrest and imprison any citizen upon suspicion that he has committed some crime; and any person so arrested and confined, may be discharged therefrom by the judge of any Court of competent jurisdiction, under the writ of *habeas corpus*.

APPEAL from the *Ripley* Circuit Court.

PERKINS, J.—The following special order was issued:

“HEADQUARTERS DISTRICT OF INDIANA AND MICHIGAN,
Indianapolis, August 5th, 1863.

Special Order No. 40.

Col. *Conrad Baker*, Assistant Provost Marshal General,
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State of *Indiana*, will arrest and send to these headquarters all persons engaged in stealing, concealing, or preventing the delivery of any Government property, or any property to which the *United States* have just claim. Col. *Baker* will instruct his Provost Marshals accordingly.

By command of Brig. Gen. *Wilcox*.

Robert W. A. Hutchins, Capt. and A. A. Gen."

Col. *Baker*, by *John C. McGuiston*, Captain and Provost Marshal, forwarded the foregoing order to *Jeremiah D. Skeen*, Deputy Provost Marshal for *Ripley* county, *Indiana*, with instructions to prudently carry it into effect. In so doing, said Deputy Provost Marshal *Skeen*, apprehending that *Dederick Monkeimer* had stolen a horse belonging to the *United States*, arrested said *Monkeimer*, *mero motu*, and took him to the jail of *Ripley* county, and required the jailor to confine him therein, which said jailor refused to do; whereupon said Deputy Provost Marshal *Skeen* required the jailor to surrender the keys of the jail to him, which the jailor did; and thereupon said Deputy Provost Marshal *Skeen* locked said *Monkeimer* up in a cell of the jail. The next day *Monkeimer* obtained, through *Ed. P. Ferris*, Esq., his counsel, from Judge *Chapman*, of the *Ripley* Circuit Court, *Indiana*, a writ of *habeas corpus*, upon the return of which he was set at liberty by the judge, no verified charge of any offence whatever being preferred against said *Monkeimer*.

Deputy Provost Marshal *Skeen* appeals to this Court, on the ground that a judge of the State of *Indiana* had no jurisdiction or power to take *Monkeimer* from the prisoner's cell—he avers that he is Deputy Provost Marshal of the *United States* for *Ripley* county, and that he is, therefore, not liable to answer to a State tribunal in relation to any arrest he may make by color of that office, nor to obey the order of such a tribunal for the release of a prisoner so arrested.

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We have said all that we desire to say on the general question of jurisdiction, in *The Ohio and Mississippi Railroad Co. v. Fitch*, 20 Ind. 498.

The case is simply this: Deputy Provost Marshal *Skeen* suspects that *Monkeimer* has stolen a horse, or concealed a horse, or prevented the returning of a horse, or something else belonging to the Federal Government, and he, without any charge being legally preferred, arrests *Monkeimer*, confines him in a felon's cell till it suits his convenience to send him to military headquarters. Now, if he can do this in one case, he can do it in all, and arrest every human being in his county and serve them in the same way, if he can find jail-room enough; and if Deputy Provost Marshal *Skeen* can do it in his county, then the Deputy Provost Marshals of all the counties in the *United States* can do it, and thus every citizen of the *United States* may be arrested, imprisoned, and sent to military headquarters at the mere pleasure of these military policemen, and all the States laid at once at the feet of military power. We can not assent to this doctrine. It would establish the most terrific despotism the world has ever witnessed. And it is not improper to add here the remark, that *Indiana* has never been in a condition to justify, according to any established principle of law, the superseding of the judicial by the military power, in the prosecution and punishment of crime; yet it is now matter of amazement, when we look back and see to what an extent this has been practiced, and the rights of personal liberty and personal security disregarded. Said Lord *Coke*, even in his partially barbarous age: "When the Courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellions, or such like, the peaceable course of justice is disturbed and stopped, so as the Courts be, as it were, shut up, *et silent*

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inter leges arma, then it is said to be time of war." Coke's Com. on Litt. Lib. iii, chap 7, sec. 412, p. 249, 6, as quoted in Law. Wheat. Int. Law, p. 525, note.

When has been the time that the Courts, both State and Federal, were not ready to act, and able to act, in *Indiana*, and that their officers could not arrest, and bring to them for punishment, upon legal warrant, any man charged, according to the forms of law prescribed by our Constitution, with crime?

We may say a word upon another point; and that is, that the orders of a superior officer to an inferior, to do an illegal act, may not be a protection from liability, on the part of such inferior officer, in the performance of such act. This was settled in the case of *Mitchell v. Harmony*, 18 How. (U. S.) Rep. 115. See, also, *Kendall v. The United States*, 12 Pet. 412, 613; *Mostyn v. Fabrigas*, Cowper, 161.

Indeed, it is the *English* doctrine that general warrants from the Crown or Privy Council to do illegal acts will not protect those who execute them. See *Fisher v. McGirr*, 1 Gray (Mass.) Rep. 1; S. C., 2 Am. L. Reg. p. 460.

Per Curiam.—The judgment below is affirmed, with costs.

John K. Cravens, for the appellant.

Edwin P. Ferris, for the appellee.

THE AMERICAN EXPRESS COMPANY v. HAIRE and Others.

EXPRESS COMPANY, LIABILITY OF.—If an express company receives for collection, for a compensation, a bill of exchange drawn in one State and payable in another, and delivers the same to a notary for demand and protest on the day before such demand and protest

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should be made, and such notary makes demand and protest one day before the maturity of the bill, whereby the drawer and endorsers are discharged, the acceptor being insolvent, the express company will be liable to the holder for the amount of the bill and interest.

APPEAL from the *Marion* Common Pleas.

PERKINS, J.—On the 25th day of *October*, 1857, *Dunlevy, Haire & Co.*, of *Indianapolis, Indiana*, owned and possessed a bill of exchange, drawn by *R. A. Douglass*, endorsed by *Blake and Vanblaricum*, and accepted by *P. A. Douglass*, 809 *Broadway, New York*, for 5,000 dollars. The last day of grace for payment of the bill was *November 6th*, 1857.

On the 25th day of *October*, 1857, the *American Express Company* received the above described bill of *Dunlevy, Haire & Co.*, at *Indianapolis*, in the capacity of agents, to collect it for a reasonable compensation, and return the proceeds to the holders of the bill at *Indianapolis*. The company took the bill to *New York*, and, on the 5th of *November*, placed it in the hands of a respectable notary for demand and protest. The notary demanded payment, and protested the bill on that day, and no other demand was ever made. The demand and protest should have been made on the 6th of *November*, instead of the 5th, when they were made. The company never collected the bill; the endorsers, then solvent, were discharged by the carelessness of the notary, and the drawer and acceptor are insolvent.

Dunlevy, Haire & Co. sued the express company for the amount of the bill, and they recovered below.

The main question in the cause is: Did the express company become liable to the holders for the amount of the bill on account of the failure to demand its payment on the proper day? We say this is the real question; because, if the express company became liable by that failure, we do not see that the de-

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lay of the holders to sue upon that liability, or their attempt to get their money on the bill from the indorsers, has extinguished that liability. See Ed. on Bills, p. 405. If the bill was not one requiring protest, not one requiring the services of a notary, then the notary can be regarded as simply the agent of the express company, and that company as liable for his negligence. The bill in question was drawn in one State payable in another. The great weight of authority certainly is, that a foreign bill must be protested by a notary, if one be convenient; if not, then by persons present. 1 Par. on Notes and Bills, pp. 358, 633, and 842; 2 *id.* 328; *Miltenberger v. Spaulding*, 33 Mo. 421; *The State Bank v. Hayes*, 3 Ind. 400. In those States, then, that hold a bill drawn in one State of the Union on a person in another, to be completely a foreign bill, it would follow that a notary's protest would, as a general rule, be required.

Taking it for granted, then, for the purposes of this case, that the bill before us is a foreign one, and required a notarial protest, and a notary having, in fact, been employed, is the express company liable for his negligence? Or did the liability of that company cease when it delivered the bill, at the proper time, &c., to a competent notary, supposing the delivery was thus made in this case?

Upon this question the authorities are in conflict. One division of the authorities holds that a notary is a public officer, who all may or must employ, and who is alone answerable for his own negligence to the injured party. But the *New York* authorities, and those in some other States, are different. Says *Mr. Parsons*, in his late work on Notes and Bills, vol. 1, p. 480: "The authorities are not uniform on this question; some hold the bank [or other agent] liable for the proper conduct of the notary employed; and those which hold the bank discharged by due care in selection, [of the notary] seem to apply the same rule to any person selected with due care as a competent agent."

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Chancellor *Kent*, in his Commentaries, vol. 2, p. 94 of the 6th edition, and p. 128 of the 10th edition, in note, says: "In *South Carolina* the rule of law is in conformity with that declared in *New York*, and a bank who receives a note for collection is liable for any neglect by which the endorsers are discharged. The use of the monies collected is deemed a sufficient consideration for the undertaking. The bank [or other agent: the express company, for example,] must, therefore, see to the demand of payment of the maker, and to the giving of due notice of non-payment to the endorsers. If the note be placed in the hands of a notary, he is to be regarded as the agent of the bank, and for whose neglects and mistakes the bank is liable. *Thompson v. The Bank of South Carolina*, 8 Hill's S. C. Rep. 77." In *Hoard v. Garner*, 8 Sandf. N. Y. Rep. 179, the *New York* doctrine is stated thus, by Judge *Sandford*: "The principle established by *Allen v. The Merchants Bank*, 22 Wend. 215, was, that the implied contract of the banker was an undertaking to do the thing itself, and was not the delegation of an agent or authority to procure the thing to be done; that the contract looked mainly to the thing to be done, and his undertaking was for the due use of all proper means for its performance; that it was not a contract only for the immediate services of the agent and his acting faithfully as the representative of his principal; that in the latter case the responsibility ceases with the limits of the personal services undertaken: in the other it extends to cover all the necessary and proper means for the accomplishment of the object, by whomsoever used or employed." For later *New York* cases, see 3d Selden, 459; 3d Kernan, 203; Edwards on Bills, pp. 112, 402, 403, and 476.

Ohio follows the line of these decisions. *Reeves, Stevens & Co. v. The State Bank of Ohio*, 8 Ohio St. Rep. 465.

Indiana has followed the same line of decision, as applicable to banks; *Tyson v. The State Bank of Indiana*, 6 Blackf.

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225; and as applicable to attorneys; *Abbott et al. v. Smith*, 4 Ind. 452. The question as to the applicability of the doctrine to a notary, has not arisen in this State, nor do we think it now arises. The express company did not, in this case, deliver the bill to the notary at the proper time. We think the negligence in this case is chargeable to the express company. That company did not limit themselves, in the use of the notary, to his official functions; and their own act, in prematurely placing the bill in his hands, tended to mislead him. If the company had retained the bill till the hour of presentment for payment, then accompanied the notary to the place of demand, or even if they had not accompanied him, a premature presentment would not have been made. See 4 Wharton (Penna.) Rep. 118; 18 Penna. St. Rep. 268; 21st *id.* 506.

On this point we adopt the language of Judge *Ray*, who decided the case in the Common Pleas:

"It was clearly the duty of the express company to convey the bill to *New York*, and, at the proper time and place, to present the same and demand payment thereof. It was their duty to retain the custody of the bill and the control of the same. If payment was refused, they should cause the same to be duly protested and notice given. It can not be insisted that because the acceptor might not pay the bill, therefore the express company were not required to present it and demand its payment. The acceptor might, and the presumption in such case is, that he will pay upon demand; and if without any demand the bill be given to a notary and he collects and retains the proceeds, the express company could not evade responsibility for the default of the officer. It would have been a case in which the employment of a sub-agent is not required. The notary is not, by virtue of his office, a collector; and if he were, the defendants are the collecting agents selected by the plaintiffs. If the notary,

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having possession of the bill the day before it was due, had negotiated the same, it is clear the defendants would have been liable. The bill was entrusted to their custody, and, unless there be a necessity for the transfer of that custody, it can not be lawfully changed. Did that necessity exist? Certainly it did not at the time it was made, and it is not clear but that such delivery of the bill to the notary, the day before it became payable, followed as it was by a protest upon the same day, was the immediate cause of the default. But a review of the duties of a notary may furnish a still more satisfactory answer to the inquiry. The peculiar province of this officer is to furnish evidence. His certificate and seal are received as proof of the fact of the presentment of bills of exchange for acceptance or payment. He is not, either at common law or by statute, made the custodian of the paper, but simply the witness to attest and prove the act performed in his presence or under his eye. The bond he gives is but nominal and the law does not require that papers of such value shall be placed in his absolute, uncontrolled charge. He is not like a sheriff, who is the custodian of the writ he executes, and who makes his return upon that writ. The one is an officer of the law having charge of the thing itself, with power to enter thereon his doings and retain the possession thereof and return the same into court. The other is but a witness to attest what is done, perhaps by another, in his presence, having no power over the paper presented and no legal right to its custody or control. It is convenient, doubtless, to transfer the possession of the paper to the notary, to hunt up the acceptor and make demand, but this convenience is accompanied by its risk, and the risk not being absolutely necessary, must be assumed by the party who voluntarily incurs it on account of its convenience."

It is said the recovery below was too large, interest having been allowed on the bill from maturity. Less than that sum

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would not have been recovered in a suit on the bill against the indorsers had they not been discharged by the negligence of the express company. Says Edwards on Bills, page 405: "Where a bank with whom a note is deposited for collection fails to take the proper steps to charge the drawer or indorsers, in consequence of which the holder is unable to collect the amount of the bill, the measure of damages is the face of the bill with interest." See, also, Sedgwick on Dam. 358, citing *Walker v. Smith*, 4 Dall. 389.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

Newcomb & Tarkington, for the appellant.

Barbour & Howland, for the appellee.

GREEN and Others v. BOODY and Others.

PLEADING—RAILROADS.—In an action for forcibly entering upon land, and digging the soil, excavating pits, making embankments, &c., an answer that the defendants entered as the servants of a specified railroad company, which had legally appropriated the injured property as the line of her road, &c., would justify the entry and bar the suit.

APPEAL from the *Cass* Circuit Court.

PERKINS, J.—*Green* and others commenced an action to recover damages occasioned by an alleged trespass committed by *Boody* and others upon the land of the plaintiffs, on which were situate mills, machinery, &c. The plaintiffs alleged that they were, and for many years had been, the owners, and in possession of the land, mills, &c.; that while they were thus owners and possessors, the defendants, unlawfully and forcibly,

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entered upon said land, mills, &c., to-wit: on the 1st day of April, 1858, and on divers other days, &c., before the commencement of this suit, "and dug up the soil, excavated pits, raised embankments, set in abutments of stone and erected piers, cut down the banks, broke up and destroyed large quantities of lumber, and carried away the same, and other wrongs then and there did, whereby the said mill seat and buildings, and machinery thereon, were injured and destroyed, &c., to the damage, &c."

The defendants answered that they entered as the servants of the *Toledo and Wabash Valley Railroad Company*; while acting under its charter, and which company had appropriated said injured property as the line of her road, &c.

A demurrer to the answer was overruled, and the defendants had final judgment in their favor.

This suit was for the illegal entry upon the lands; the destruction of the mill, the lumber in it, &c., and the digging up of the ground, &c., are but matters of aggravation. An answer, then, which justified the entry, barred the suit, because, says *Mr. Stephens*, in his work on pleading, pp. 217, 243, no issue should be taken on, nor answer made to matters of aggravation. See, also, 1 Chit. Pl. 397; 4 Blackf. 179; 3 Ind. 404; Gould Pl., sec. 10, chap. 8. The company or hands may, perhaps, be liable to a suit brought for the value of any personal property injured or destroyed which was not included in the property taken by the company for the construction of the road.

The answer, above stated, is shown to be a good bar to this action, as instituted, by the case of *The President, &c. v. Wright*, 5 Ind. 252, and cases there cited; and *The Indiana Central Railway Co. v. Oakes et al.*, 20 id. 9.

Per Curiam.—The judgment is affirmed, with costs.

D. D. Pratt and *D. P. Baldwin*, for the appellants.

William Z. Stuart, for the appellees.

Chapin v. The Board of Commissioners of Steuben County.

CHAPIN v. THE BOARD OF COMMISSIONERS OF STEUBEN COUNTY.

CONTRACT—PAYMENT—PLEADING.—*A* recovered a judgment against a county, and a few days thereafter the county auditor issued county orders to pay the judgment, and delivered them to *A*, who received them in payment and satisfaction of the judgment. The judgment was afterwards reviewed and reversed, and a new trial ordered. *A* then pleaded the facts aforesaid as equivalent to a voluntary payment and discharge of the judgment by the county, and as a bar to a re-trial.

Held, that the auditor had no power to contract that said orders should be received in payment and satisfaction of said judgment, and that their delivery as aforesaid did not amount to payment, and constituted no bar to the re-trial of the cause.

PRACTICE.—When a cause is appealed to this Court for error in sustaining a demurrer to the complaint, and the error is confessed here, and the judgment reversed and the cause remanded, and the demurrer is then overruled by the Court below, it is not error for the latter Court to refuse to permit another demurrer to be filed to the same complaint.

APPEAL from the *Steuben* Circuit Court.

HANNA, J.—*Chapin* filed before the appellees a claim for services as Clerk of the Circuit and Common Pleas Courts, and asked an allowance out of the county treasury.

The claim consisted of a per centage for receiving and paying out money on judgments, legacies, &c., and also for indexing books of record.

The appellees refused to make any allowance; *Chapin* appealed to the Circuit Court where there was judgment, for the amount of the claim, by default. Three days after the rendition of the judgment the county auditor issued to *Chapin* orders on the county treasurer for a sum equal to the amount of the judgment.

Within a year afterwards the present appellee instituted a

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proceeding to review said judgment on the grounds that the complaint did not state a cause of action; that it showed the said appellee was not liable to pay the claim set up and upon which judgment was rendered; that said judgment was for more than by the complaint appeared to be due; that the said Court had no jurisdiction of the subject matter, and could render no judgment upon it. To this complaint a demurrer was sustained, the case brought to this Court, and said ruling assigned for error. The error was confessed, the judgment reversed, and the cause sent back to the Circuit Court, where the demurrer was overruled. *Chapin* then sought to file another demurrer to the same complaint, which the Court refused to permit. An answer was then filed containing, first, a general denial; second, setting up the filing before and refusal by the appellees of said claim, the appeal, judgment by default, and reception of county orders, and averring that appellees had ample time to employ counsel and prepare for trial, but failed to do so; and that the auditor delivered the orders by him drawn upon the county treasurer in payment and satisfaction of said judgment, and that he in good faith so received them; that, afterwards, said auditor reported to said appellees the payments to county officers, included in which were said orders, and they received, ratified and confirmed said report, &c.

A demurrer was sustained to this second paragraph, and, the said *Chapin* failing to answer further, the judgment was reviewed and reversed; the case afterwards tried, and a finding and judgment for the defendants, the appellees.

A question of practice was raised on the return of the case from this Court, after the confession of errors. After the demurrer to the complaint for a review had been overruled, as directed by this Court, the said *Chapin* sought to file another demurrer to the same complaint, somewhat differently worded. We think the Court ruled correctly in refusing to

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grant said motion ; for, whether in any instance, a Court has the discretionary power to permit a second issue of law to be made on the same pleading or not, a case is certainly not shown where such discretion, if it exists, has been abused. The main question arising in the case is presented by the ruling on the demurrer to the second paragraph of the answer ; and it is argued that the act of the auditor in issuing and of *Chapin* in receiving the county orders, as alleged, was a payment of the judgment and a discharge thereof, voluntarily made by said appellees, and that after a judgment is discharged it should not be reviewed or reversed.

Two grounds are taken by the appellee : First, that the county auditor had no legal power to issue said orders, and they were therefore void ; second, if he had, that issuing them and passing them over to the said *Chapin* did not operate as a payment of said judgment.

It appears to us that the latter proposition is so clearly right that it is useless to inquire as to the former. If a judgment debtor should draw a check on a bank in favor of a judgment creditor would it *per se* operate as a satisfaction of the judgment ? or if, in like manner, he should draw an order on a third person, it would not have any greater effect ; or, if he should execute his promissory note, that act merely would not amount to a payment.

It has been held by this Court that a county order is, in effect, the promissory note of the county. We do not regard the answer as being any broader than the propositions here stated, for the reason that the auditor had no legal power to contract with the said *Chapin*, as averred, that the orders should be delivered in satisfaction and payment, &c.

Per Curiam.—The judgment is affirmed.

D. E. Palmer and *Case & Morris*, for the appellant.

A. Ellison, for the appellees.

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SEDUCTION—PLEADING.—In an action by the father against the seducer of his daughter, to recover damages, the basis of his recovery must be the loss of her service, his injured feelings, &c., and in such action, a former recovery by the daughter, in an action in her own name against her seducer, can not be pleaded in mitigation.

INSTRUCTIONS TO JURY.—In such action, where both the daughter and her alleged seducer testify and directly contradict each other, and there is testimony tending to sustain the daughter, it is error, as tending to mislead the jury, for the Court to instruct the latter, that "as to the main fact of sexual intercourse, the daughter affirms it and the defendant denies it, and if the two seem equally to claim your credence, you can not, in such case, find for the plaintiff, because, as to that fact, which is radical in the case, there is no preponderance for the plaintiff."

EVIDENCE OF CHARACTER.—Mere contradiction among witnesses examined in Court supplies no ground for admitting evidence of general character.

PLEADING.—A pleading based upon the proceedings and judgment of a Court will be demurrable, unless it be accompanied by a transcript of the record.

APPEAL from the *Marion* Circuit Court.

HANNA, J.—Appellant sued appellee for the seduction of his daughter. Answer: first, in denial; second, in mitigation, that the daughter had already sued and recovered 75 dollars for the same seduction. Demurrer to the second paragraph overruled. Trial and judgment for the defendant. Rulings on the demurrer, on the admission of evidence, and in instructing the jury, are objected to as erroneous.

As to the demurrer, there is no doubt it was well taken, because the paragraph of the answer was based upon the proceedings and judgment of a Court and a transcript of the record was not filed. But on the main point, to-wit: whether

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such recovery could be set up in mitigation, we are of opinion that it could not. Whatever the parent might recover would be for the loss of services, wounded feelings, &c, *Shattuck v. Myers*, 13 Ind. 52, and would go to his own use. That which might have been recovered by the female seduced was for her use, and in which the father could have no direct interest, and over which he had no control.

There was a direct conflict in the testimony of the female, who it was alleged had been seduced, and the defendant, who were both witnesses, as to the fact of carnal intercourse having taken place. Beyond this conflict there was no impeachment of the character of either for truth; no evidence attacking the general character for veracity. The defendant offered, under these circumstances, several witnesses to sustain his general character for truth and veracity. The Court, over the defendant's objection, admitted the evidence. This was erroneous. "Mere contradiction among witnesses examined in Court, supplies no ground for admitting evidence of general character." 1 Greenleaf, sec. 469, and authorities cited. Whether this rule is founded on reason or not, it is assuredly in convenience. For if, in the multiplicity of contradictions daily occurring, each witness was permitted to bring in other witnesses to sustain his general character—and they, contradicting each other, should be permitted to bring in others, the whole time of our courts would be taken up in hearing these side questions, until the matters originally in litigation would be almost lost sight of, to the great detriment of suitors.

The Court instructed the jury correctly that the case, being a civil suit, should be decided on the weight of evidence; and that, if the evidence was evenly balanced, the plaintiff could not recover; but afterwards said to them: "As to the main fact of sexual intercourse, the daughter swears to this fact, and the defendant denies it; if these two witnesses, as

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they stand before you, seem equally to claim your credence, you can not in such a case find for the plaintiff, because, as to that fact, which is radical in the case, there is no preponderance for the plaintiff."

This instruction appears to assume that there was no other evidence, either positive or circumstantial, tending to establish this fact. The female had testified that several acts of copulation had taken place, at divers times, in the month of *June*, 1860, at the barn of defendant, where she daily went to milk and feed a cow, she being then hired to defendant. The defendant directly contradicted this, and stated that he "was not alone with her at the barn at any time in the year 1860, unless she was passing round when I was there. Did not remember of ever going into the barn with her."

One *Ballard* testified that he was "at work for the defendant in *May*, 1860, between the house and barn; saw her and defendant together several times at the barn, where she went to milk the cows. The defendant would sometimes go in before her and sometimes just after. Saw her go there one time about ten o'clock, A. M., after potatoes, and defendant followed then."

The existence of this testimony seems to have been ignored by the Court in the instructions; although the record shows that the defendant had attacked the general reputation of said *Ballard* for truth by several witnesses.

It appears to us the instruction had a tendency to, and perhaps did, mislead the jury.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Giltner, Nave & Witherow, for the appellant.

L. M. Campbell, for the appellee.

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JONES v. WHITWORTH.

APPEAL from the Posey Circuit Court.

Per Curiam.—This was an action for the possession of personal property, namely: wheat. The suit was commenced before a justice; judgment for the plaintiff before the justice, and also in the Circuit Court, to which an appeal was taken.

There does not appear to have been any pleading filed, or motion made, touching the validity of the complaint or writ.

The questions sought to be pressed here have reference to validity of the complaint and sufficiency of the evidence.

It is too late to present now, for the first time, the points raised upon the former question, and, as to the latter, the record is not in such form as to enable us to say that the whole evidence is therein contained.

The judgment is affirmed, with 5 per cent. damages and costs.

Carloss R. Kelsey and *Harvey D. Scott*, for the appellant.

Ellis Lewis, for the appellee.

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 GUY v. PIERSON and Others.

JURISDICTION—DECEDENT'S ESTATES.—In an application by an administrator for an order to sell real estate, if the record show that the heirs were not otherwise notified of the pendency of the proceedings than by the appointment of a guardian *ad litem* for them, and citing him to appear and show cause why the property should not be sold, the Court would have no jurisdiction over them, and the proceeding as to them would be a nullity.

SAME—PRACTICE.—In such a proceeding, if the record fail to name the heirs otherwise than by the general designation, "heirs," the

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proceeding will also be void as to them, and there could arise no presumption that the Court had acquired jurisdiction over any other persons than those named, and, in such case, the heirs could not prosecute an action for review of the proceeding, because they were not parties to it; but it would be otherwise if the proceedings had been against them as *unknown* heirs.

APPEAL from the *Morgan* Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellees.

The complaint alleges that, in 1837, *Laban Guy*, the father of the plaintiff, was seized in fee of a certain parcel of land, described in the complaint, and in that year died, leaving a widow, and some other children, naming them, besides the plaintiff; that afterwards, in the year 1838, *James Johnson*, the administrator of the estate of the deceased, procured an order from the Probate Court of said county for the sale of said land, for the payment of the debts of the deceased; that the children and heirs of the deceased were not made parties to the application for such sale; that in *October*, of the same year, the land was accordingly sold to said *Pierson*; and that, in 1841, the sale was confirmed, and a conveyance made to said purchaser. The record of the proceedings of the Probate Court is set out and made a part of the complaint. It is further averred, that at the time of the sale, &c, the plaintiff was an infant, and did not arrive at 21 years of age until the 22d day of *October*, 1858; that since said sale, the said *Pierson* has had possession of the land, and has received the rents and profits thereof, amounting to 1,050 dollars per annum over expenses, &c. It is alleged that the proceedings of the Probate Court are erroneous, &c. Prayer for a review, &c., and that the plaintiff may recover possession of one-fourth of the land, with the value of the rents, and profits, and damages, and for general relief.

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Pierson, Johnson, the administrator, and others, were made defendants.

The defendants filed a joint demurrer to the complaint, on the ground, amongst other things, that it did not state facts sufficient, &c. The demurrer was sustained, and exception taken.

In order to determine the correctness of the ruling on the demurrer, it is necessary to examine the proceedings of the Probate Court, and ascertain whether the objection made, viz: that the Court had no jurisdiction of the parties, is well taken.

The petition or application for an order for the sale of the land does not mention the names of the heirs of the deceased, nor does it in any manner allude to them. Upon the application being filed, the record proceeds as follows: "And the matters being considered, the prayer of said administrator is granted, and it is ordered that *Abraham Lafever* be, and he is, hereby appointed a guardian *ad litem* for the minor heirs of said *Laban Guy*, deceased; it is therefore ordered that said *Abraham Lafever*, guardian *ad litem*, and *Nancey E. Guy*, the widow of said decedent, be cited to appear in this Court on the first day of the next term, and show cause, if any they have, why said real estate shall not be sold and made assets for the discharge of the debts against said decedent's estate." At the next term the record states, that "whereas *James Johnson*, the administrator of the estate of *Laban Guy*, deceased, at the last term of the Court, filed his memorial, setting forth that the personal estate of said decedent was insufficient for the payment of his debts, and showing sundry messuages and tenements, which were the real estate of said decedent at the time of his death, and praying an order of the Court for the sale of the real estate, and the heirs of said decedent having been duly notified herein, and no cause shown to the contrary, and *Abraham Lafever*, the guardian

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ad litem for the minor heirs of the decedent now comes and files his answer herein in the words and figures, following, to-wit: (here follows the answer of the guardian *ad litem*,) admitting the insufficiency of the personal estate of the decedent to pay the debts against said estate, and that he knows of no reason why the said real estate should not be sold and made assets for the purpose of discharging the said debts: it is ordered," &c.

It will be noticed that *Lafever* was appointed guardian *ad litem* for the minor heirs immediately on the filing of the petition, and, it is to be inferred, in his absence; for it was ordered that he and the widow be cited to show cause, at the next term, why the land should not be sold. At the next term, when the land was ordered to be sold, the record recites that the heirs had been duly notified therein. The record contains no process or notification whatever. The natural interpretation of this record is, that the heirs had been notified by citing the guardian *ad litem*, as previously ordered by the Court. If this was the only notification given the heirs, the Court had no jurisdiction over them, and, as to them, the proceeding was a nullity. *Doe v. Anderson*, 5 Ind. 38.

But whether the above be the true interpretation of the record or not, there is another fatal defect in the proceedings which renders them void as against the plaintiff. The record nowhere names the heirs of the deceased. They are nowhere mentioned, except by the general designation, "heirs." There is no such thing as an adversary proceeding in Court against a party without naming him, unless it be in special cases where the statute authorizes it. Suppose, in this case, process had issued to the sheriff, directing him to notify "the heirs" of the decedent; upon whom would he have served it? He undoubtedly would have served it upon those whom he supposed to be heirs; but it was not for him to determine

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who were or who were not heirs. If process was served upon individuals by name, as such heirs, the record should have disclosed such names. The record not disclosing the names of the heirs, there is no foundation to presume that the Court had acquired jurisdiction over any person, except the widow, who was named. *Babbitt v. Doe*, 4 Ind. 355. The persons who were the heirs of the deceased can not be regarded as parties to the proceeding in the Probate Court, and as to them it was a nullity. For the reason that the plaintiff herein was not a party to that proceeding, he can not maintain a complaint to review it. *Davidson v. Lindsey*, 16 Ind. 186.

Where a statute authorizes a proceeding against unknown heirs, without naming them, as in section 40 of the code, such heirs may undoubtedly maintain proceedings for a review, because they are then parties; but such was not the case here. And for the reason that the plaintiff was not a party to the proceeding in the Probate Court, he is not bound by that proceeding, and his title to his share of his father's estate has not passed from him. The complaint, leaving out of view the prayer for a review of the proceedings of the Probate Court, states a good cause of action against *Pierson*; it shows that the plaintiff is entitled to recover his share of the land, and that the defendant is in possession. There is also a sufficient prayer for a recovery of the possession, &c. The demurrer was filed by all the defendants; and not being well taken as to one of them—*Pierson*—it should have been overruled.

Per Curiam.—The judgment below is reversed, with costs.

William R. Harrison, Samuel H. Buskirk, Joseph E. McDonald and A. L. Roache, for the appellant.

Hester & Phelps, for the appellees.

DeForest v. The State.

DeFOREST v. THE STATE.

CRIMINAL LAW AND PRACTICE—EVIDENCE.—In justifying a homicide in defence of person, property, &c., it is competent for the defendant to give in evidence any facts tending to show the character of the attack he resisted, the intention with which it was made, and that he had reasonable grounds to believe it was necessary to do what he did in resisting it, and to this end he may show the relations that had existed between himself and the deceased for an indefinite period before the killing.

SELF-DEFENCE.—If a man, on returning to his own house find himself barred out and excluded therefrom by another, and then repeatedly demands, and is denied admission, he has a legal right to break in the door; and if he encounter resistance on thus entering, and be first stricken by the unlawful occupant with a deadly weapon, and then, meeting force with force, he take the life of such occupant, such killing would seem to be excusable homicide, committed in self-defence.

APPEAL from the *Marion* Circuit Court.

WORDEN, J.—The appellant was indicted for the murder, in the second degree, of *John Burrows*. Conviction of manslaughter, and sentence of imprisonment in the State's prison for thirteen years.

The following are the facts, as they are set out in a bill of exceptions:

The defendant was the occupant of a house in the city of *Indianapolis*. This house consisted of a front room, back of which were two bed-rooms, with doors opening into the front room; also a porch, with a door opening into the front room, and a bed-room at one end of the porch, with a door opening from the porch. This bed-room did not communicate with other parts of the house, except by way of the porch. The defendant had let to a *Mrs. Bratton* the front room and one of the bed-rooms back of it, reserving to himself, however,

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the right of ingress and egress to and from the other bed-rooms through the front room. The defendant's wife slept in the bed-room to which the right of way was thus reserved. *Burrows*, the deceased, usually slept in the bed-room at the end of the porch, and the defendant slept sometimes with his wife and sometimes with the deceased. On the day before the homicide was committed, a niece of *Mrs. DeForest* came there on a visit. The defendant ate his supper and went down town. It was then agreed, says the bill of exceptions, that he should sleep with the deceased, in the bed-room at the end of the porch, and that the niece and *Mrs. DeForest* should sleep together in the other bed-room. After the defendant went down town, as above mentioned, *Mrs. Bratton* invited the deceased to sleep in the front room that night, as she says she was afraid of the old man—the defendant. This was the first time such an invitation had been extended to the deceased. The parties in the house, viz: *Mrs. Bratton* and two sisters-in-law, the deceased, *Mrs. DeForest* and her niece, retired to bed, having taken the axes into the house, and hidden them under the bed, and having fastened the door to keep the defendant out. The defendant returned about 11 o'clock, or after, and, finding the door fastened, asked those inside to open it; they refused; he asked several times; then went away to one *Dan. Man's*; came back, and said that *Man* told him to break open the door; the parties inside still refused to open it; he then went into the cellar and got an ax, which had been forgotten when the axes were gathered up and taken into the house and hidden, as above mentioned, and with the ax he beat down the door; the door being beaten down, the defendant encountered the deceased, who had an ax handle in his hand, and the evidence very strongly tends to show that the deceased first struck the defendant upon or about the head with it. The defendant

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struck the deceased upon the head with the ax, of which he died in the space of between two and three months.

The testimony of several witnesses shows that the defendant was a peaceable, quiet, industrious man, and nothing appears to show that he was in the habit of intoxication, or otherwise, to explain why the inmates of the house should be afraid of him, or why they should have gathered up the axes and taken them into the house, and locked the door against him. On the evidence, as it comes up to us, it is extremely doubtful whether the conviction ought to be sustained. Without explanation, it looks somewhat strange that the axes should have been brought into the house, and secreted under the bed; that the deceased should, for the first time, have slept in the room rented by *Mrs. Bratton*, and that the door should have been locked to keep the defendant out. It would have been much more satisfactory had a reason been shown for all this defensive preparation. The defendant, it will be seen, was not a party to the arrangement by which he was to sleep in the room on the porch with the deceased; that arrangement was made, according to our reading of the bill of exceptions, after he had gone down town. Upon coming home he found his door locked; he found himself locked out of his own house, and those within refusing to open it; he went to a neighbor, and upon again returning, the parties within still refusing to open the door, he got an ax and beat it down; this, for aught we can see, he had a legal right to do. Upon knocking the door down, he encountered the deceased upon the inside, armed with an ax handle, and, if the deceased struck the defendant with it first over the head, we are not prepared to say that the homicide was not, under the circumstances, excusable as a matter of self-defence.

But we do not decide the case upon the evidence. Enough of the case has been stated to show the application of certain

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evidence offered by the defendant. The defendant proved, that, about five months before the homicide, the deceased struck the defendant with a club, which felled him, but he recovered, and started towards the witness' door; the deceased seized an ax and threw at him, which grazed his head as he was entering the door. The deceased threatened to kill him.

This evidence, after having been given, was withdrawn from the jury, and the defendant excepted. The defendant then offered to prove that there had been a continued series of threats made by the deceased against the life of the defendant during the five months previous to the difficulty, and coming down to that time, and that he had, on several occasions, attempted to put those threats into execution; and also that the deceased was physically much stronger and more powerful than the defendant. The testimony was excluded.

In view of the case made by the State against the defendant, we think the evidence offered by him should have been received as tending to show that he had reasonable ground to believe that it was necessary for him to go so far as he did in order to protect his own life, or his person, from great harm; in short, to show that he was acting in justifiable self-defence. The authorities, we think, clearly show that the evidence offered was admissible. *Dukes v. The State*, 11 Ind. 557; Wharton's Am. Cr. Law, sec. 641; Wharton's Homicide, p. 217.

Per Curiam.—The judgment below is reversed, and the cause remanded.

J. Milner, for the appellant.

W. W. Leathers, Prosecuting Attorney, for the State.

Pierce et al. v. Mills et al.

AYRES v. THE STATE.

APPEAL from the *Jay* Common Pleas.

Per Curiam.—The information in this case charges *Ayres* with having had in his possession four counterfeit bank notes, with intent to put them in circulation, knowing the same to be counterfeit. There was a verdict against the defendant, upon which the Court, having refused a new trial, rendered judgment. For a reversal it is insisted that the proceedings in the lower Court were not, as they should have been, founded upon an affidavit. This is a mistake. The record, having been perfected by *certiorari*, shows affirmatively that the proper affidavit was filed with the information.

The judgment is affirmed.

J. Colerick and *Lewis Jordan*, for the appellant.

Oscar B. Hord, Attorney General, for the State.

PIERCE et al. v. MILLS et al.

CONSTITUTIONAL LAW—OFFICIAL BONDS.—The act of *December 21, 1858*, (Acts Special Session 1858, p. 39,) is applicable as well to official bonds executed before as after its date, and effects only the remedy, and does not impair the obligation of such contracts, and is therefore constitutional.

APPEAL from the *Lake* Circuit Court.

DAVISON, J.—This was an action against *Jesse Pierce*, the sheriff of *Lake* county, and his sureties, on his official bond. The bond is dated *June 29th, 1857*, and is conditioned in the usual form for the faithful discharge of the duties of the sheriff, &c. The breach assigned is that the sheriff had in

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his hands an execution in favor of the plaintiffs, had collected money thereon, and had failed to pay over the same according to law. Proper issues having been made, the case was submitted to the Court, who found against the defendants 424 dollars and 50 cents. And, thereupon, the plaintiffs moved for a judgment upon the finding, without relief from the appraisement laws, &c. This motion the Court sustained, and the defendants excepted. Final judgment was accordingly rendered, &c.

Was the ruling upon the plaintiff's motion correct? When the bond sued on was executed there was no law in force within this State authorizing a judgment, without relief, &c., against a sheriff and his sureties. But subsequently, on the 6th of *August*, 1859, an act took effect which provides, "that hereafter all judgments recovered against any sheriff, constable, or other public officer, or the sureties of any or either of them, for money collected, or for a breach of any official duty, shall be collectable without stay of execution, or the benefit of the valuation laws of this State." Acts 1858, called session, pp. 39, 40. This act, though it had not taken effect and become a law when the bond was given, was in force when this suit was tried in the lower Court. Hence the inquiry arises, whether it can be so construed as to make it operative upon prior contracts. It must be conceded that the act of 1858, to which we have referred, relates to the remedy which, as has been often decided, "may be altered at the will of the State, provided the alteration does not impair the obligation of the contract." How then stands the act in question? True, it deprives the obligors of the bond of the benefit of a relief law, which existed at the time they contracted; but that result makes it operate on the remedy alone, and the contract, instead of being impaired by its operation, is, it seems to us, rendered more effective. The appellant cites *Bronson v. Kenzie*, 1 Howard 319. There it was held that

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"a State law passed and in force subsequently to the execution of a mortgage, which prevents any sale unless two-thirds of the amount at which the mortgaged property has been valued at by appraisers had been bid therefor," impaired the obligation of the contract. But it will at once be seen that that case is not applicable to the case at bar, because here the law gives force to the contract by increasing the means to be used by the obligee in enforcing the performance of it. *Andrews v. Russell*, 7 Blackf. 474.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

A. McDonald, for the appellant.

ARCHER et al. v. HEIMAN et al.

PROMISSORY NOTES—MERGER.—A suit and judgment upon a joint note against one promissor constitute a bar to any other suit against any other promissor, because the note is thereby merged in the judgment.

SAME.—In section 16 of the act of March 11, 1861, (Acts Reg. Sess. 1861, p. 145,) the word "parties," as applied to joint notes or bills of exchange, is so construed as to embrace all the makers as one party, all the indorsers another, &c., and therefore a suit and judgment upon such joint note or bill against one maker, or one indorsee, &c., would constitute a bar to any other suit against any other maker or indorser, &c.

APPEAL from the *Vanderburgh* Circuit Court.

DAVISON, J.—*Samuel Archer* and *David Mackey* sued *Desire D. Walker*, *Adam Miller*, *Isaac Heiman* and *David Heiman* upon a note in this form:

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“Evansville, Ind., Nov. 13, 1860.

“Six months after date we promise to pay to the order of Archer & Mackey 219 dollars and 57 cents, waiving benefit of appraisment laws, value received.

DESIRE L. WALKER,

“ADAM MILLER,

“I. & D. HEIMAN.”

Process as to *Walker* and *Miller* was returned “not found;” *Isaac* and *David Heiman* answered. That in *January, 1862*, the plaintiffs instituted an action in the Circuit Court of *Du-bois* county, *Indiana*, against each of the defendants sued in this case, upon the above recited note, for the recovery of the sum of money therein specified, and, at the *January* term of that Court, in the year 1862, they, the plaintiffs, recovered a judgment against *Miller* alone for 228 dollars and 90 cents, which remains in force, &c.; that after the rendition of said judgment the action as to the other defendants, *Walker* and the *Heimans*, was, upon the plaintiff’s motion, continued until the next term of said Court, and that afterwards, on the 18th of *March, 1862*, the same action, as to *Walker* and *Isaac* and *David Heiman*, was, by order of the plaintiffs, dismissed, and all further proceedings therein abandoned by them. Plaintiffs demurred, but the demurrer was overruled, and they excepted. Final judgment was given, &c.

The common law rule is, that a suit and judgment upon a joint note against one promissor is a bar to a subsequent suit against another, the note being merged in the judgment. 2 McLean 163; 5 Ohio 33; 18 Johns. 481. But this rule, it is argued, has been changed by the code, and that the rule now in force entitles the plaintiffs to recover. We are referred to section 362 of the practice act, which says: “When the summons has been served in due time on part, only, of the defendants, the plaintiff may dismiss or continue for further proceedings, his action as to those not summoned, or not

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summoned in time, and proceed to trial as to the others, or continue as to all of them, at his option." 2 R. S. page 120. This provision, although it allows the plaintiff to dismiss as to defendants "not summoned or not summoned in time," and proceed to trial as to those regularly in Court, does not, as we construe it, contemplate another action against the dismissed defendants, upon the same joint contract. Here, the plaintiffs having continued as to these defendants, might have proceeded against them in the action thus continued; but having dismissed it, the note as to them became merged in the judgment against *Miller*. This, as we have seen, is the result of such dismissal under the common law rule; and that rule, it seems to us, has not been changed by the enactment above recited. But the appellants refer to another statute, which enacts that "the holder of any note or bill of exchange negotiable by the law merchant, or by the laws of this State, may institute one suit against the whole or any number of the parties liable to such holder; but such holder shall not, at any time, institute more than one suit on such note or bill." Acts 1861, p. 145, sec. 16.

This provision does not, as we understand it, intend to designate each person who may put his name on a note or bill as a joint maker, or a joint drawer, or a joint indorser, as a party to the instrument, but such joint makers, &c., are to be deemed and taken, collectively, as one party. Thus it will be seen that a suit against one of the makers of a joint note is not intended by the enactment. If, then, the holder of a note sues a less number than all the parties, the suit must be against all the makers, or all the indorsers, who may be jointly liable. We think that this exposition of the provision just recited is correct, and it is not in conflict with the ruling of the lower Court. But section 41 of the practice act is referred to by the appellees. That section recognizes the well known distinction between joint and joint and several

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contracts, and directs the mode of procedure in cases of this sort. 2 R. S. p. 36. Indeed we know of no provision in our statutes which, in reference to the case made by the record before us, in any degree conflicts with the common law rule to which we have referred. The demurrer was, in our opinion, not well taken.

Per Curiam.—The judgment is affirmed, with costs.

A. L. Robinson, for the appellants.

Jas. E. Blythe, for the appellees.

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THE BOARD OF COMMISSIONERS OF MIAMI CO. v. BLAKE.

COSTS IN CRIMINAL CASES.—In criminal cases, county officers are not entitled to recover any costs against the State or county where the defendants are either acquitted, or discharged upon *nolle prosequi*, and in cases of conviction they can only recover of the persons convicted.

STATUTES CONSTRUED—COSTS.—Under section 25, 1 G. & H., p. 338, so far as the recovery of costs is concerned, a discharge upon *nolle prosequi* shall be deemed an acquittal.

SAME—"EXTRA SERVICES."—Under section 1 of the act of March 11, 1861, 2 G. & H., p. 652, *extra services* should be construed to embrace all services rendered by the officers therein named for which no compensation is given by law, and one hundred dollars is the largest amount which the county can legally allow for such extra services.

SERVICES—CONSTITUTIONAL LAW.—Officers take their offices *cum onere*, and services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services, and this construction involves no violation of sec. 21, article 1, constitution of *Indiana*.

The Board of Commissioners of Miami Co. v. Blake.

APPEAL from the *Miami* Circuit Court.

PERKINS, J.—*Alexander Blake* filed a claim with the Board of Commissioners of *Miami* county asking that it be allowed by said commissioners, which claim embraced the costs in criminal cases disposed of by *nolle prosequi* while he was clerk.

The commissioners refused to allow the claim. *Blake* appealed to the Circuit Court. That Court allowed him the amount of costs in the cases thus disposed of prior to the act of 1861, to which we shall refer, but refused to allow him the amount of those so disposed of after that act became a law.

If the clerk can compel an allowance of payment of the costs in question, it is because some law imposes upon the commissioners the duty of making such allowance. The right to recover costs is given and regulated by statute. *Smith v. The State*, 5 Ind. 541. At common law each party paid the officers for services as they were performed. Perk. Pr. p. 363. But, says *Blackstone*, book 3d, p. 400, "the King (and any person suing to his use) shall neither pay nor receive costs; for, besides that he is not included under the general words of these statutes, (giving costs,) as it is his prerogative not to pay them to a subject, so, it is beneath his dignity to receive them." This principle, so far as it applies to the payment of costs by the State, has been adopted as a general principal of American law. See *The State v. Rackley*, 2 Blackf. 249.

In *Rawley v. The Board of Commissioners of Vigo County*, the Court say: "We have no doubt in this case. Neither the State, nor a county, is bound by law to pay the fees and charges of the officers in cases of prosecutions on behalf of the State, in which the prosecution fails. There have been frequent cases of the kind in this Court; and we have uniformly refused to give costs against the State. It is settled

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in the Supreme Court of the *United States* that the *United States* never pays costs in any suit. *United States v. Barker*, 2 Wheat. 395. In the present case, the county can not be liable for the fees and charges stated, without an express statute on the subject." 2 Blackf. 355.

It should be observed that the point decided is that the county is not liable to pay costs in State cases for parties other than herself. Where the county is a party, she may be liable, like other parties, to pay the costs of suit. She has not the State prerogative of exemption.

At common law, then, the officers depend upon the parties for their fees, except the State, which they nominally serve gratuitously, but, in reality, get their pay, because the State fixes the rate of fees they charge private parties so high as to compensate them, in their aggregate receipts, for their services in State cases, where there are acquittals; and this is what is meant when it is said that officers take their offices *cum onere*, and the constitutional provision touching services without compensation does not apply to such. *Falkenburg v. Jones*, 5 Ind. 296; *Israel v. The State*, 8 *id.* 467. See Ind. Dig. Tit. Costs.

In the case at bar, then, we must ascertain if there be a statute making it the duty of the commissioners to allow payment of such costs as those set out in *Mr. Blake's* claim. In 1855 the Legislature enacted that: "Clerks and Sheriffs shall be entitled to receive such reasonable allowance for extra services as the Board of County Commissioners may think right and proper, to be paid out of the county treasury."

"Extra services" are not defined, but we take it that they must be services incident to their offices for which compensation is not provided by law. They surely can not be services disconnected from their offices, such as working on the highways, harvesting wheat, or traveling for any purpose and making speeches among the people.

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Perhaps, therefore, under the act of 1855, the board might, and, it might seem from the case of *The Board, &c. v. Potts*, 10 Ind. 286, that the board should allow for such service as those for which compensation is claimed in this suit.

But in 1861 the Legislature enacted this law: "That the Board of County Commissioners shall annually allow the clerk and sheriff of their respective counties an annual compensation for extra services as such, not exceeding one hundred dollars each;" but before the allowance is made an itemized and verified account must be filed; and when that is done, "the board may then make such reasonable allowance as they deem proper, *but in no event to exceed the sum above named*; which allowance shall be in full of all compensation for extra *and other services*, where no certain fee is fixed by law." 2 G. & H. p. 652. We think this section should be construed to mean, where no compensation is given by law; and thus construed, to cover the claim in the case at bar so far as it originated under it; but however this may be, we think that claim included within the act of 1855, sec. 25, p. 113, which reads thus:

"In all criminal prosecutions, when the person shall be acquitted, no costs against such person, nor against the State or county, for any services rendered in such prosecution by any clerk, sheriff, coroner, justice of the peace, constable or witness, but in all cases of conviction, such fees and costs shall be taxed and collected as in other cases, from the person convicted."

We think a discharge by *nolle prosequi* should, within the spirit of this section, be regarded, as to the question of costs, as an acquittal. The object of the section was to restore the common law as to costs in criminal prosecutions, so far as the State and county are concerned. It was intended to exempt them from liability for costs in the cases of criminal prosecutions against individuals of the community, whether

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the prosecutions resulted in convictions or not. The *nolle prosequi*, for the purposes of this statute, may be well regarded as embraced by it under the term acquittal. The *nolle prosequi*, like an acquittal, ends the given case, and at the costs of the State, the party who pays no costs. It can not be entered "except by order of the Court, on motion." 2 G. & H. p. 414, sec. 102. It can scarcely be supposed that it would be ordered in a case where a conviction could be had.

We think we shall carry out the intention of the Legislature and do justice, by thus construing these statutory provisions, and without in the least overstepping the limits prescribed for statutory interpretation and construction.

We think, under the act of 1861, one hundred dollars limits the amount which the county can allow severally to clerks and sheriffs for *extra services*, and that *nolle prosequi* in criminal cases are to be regarded as acquittals under the act of 1855, above quoted. See *The State v. Swope*, 20 Ind. 107.

Per Curiam.—The judgment is affirmed, with costs.

N. O. Ross and *R. P. Effinger*, for the appellant.

Pratt & Baldwin, for the appellee.

RICHARDSON et al. v. GIBSON.

APPEAL from the *Hendricks* Circuit Court.

Per Curiam.—*William Richardson* and his wife conveyed a piece of land to their son, *Payton Richardson*. *William* was, at the time, largely indebted to *James Gibson*, but had partially secured the debt he owed him. *Gibson* sued and obtained judgment against *William Richardson* for the debt he owed, and, in the course of his proceedings to make the

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money on it, sold the land conveyed to *Payton Richardson*, at sheriff's sale, and became himself the purchaser thereof, and then instituted this suit to set aside the conveyance, made by *William*, of the land to his son, *Payton*, as fraudulent. On the trial, *Payton* offered his two co-defendants—*William* and wife—as witnesses. The trial was before the statute making parties competent witnesses. They were not admitted. The plaintiff obtained a general verdict in his favor on the issues, and had judgment, setting aside the fraudulent conveyance. The fact of partial indemnity did not preclude the plaintiff from looking to the land in question for the making up of any deficiency. We can't see much in the case. It is right on the evidence.

The judgment is affirmed, with costs.

C. C. Nave, for the appellants.

L. M. Campbell, for the appellee.

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HUSBAND AND WIFE—ADMISSIONS.—In an action by an administrator, on a note payable to his intestate, who, at its date, was a married woman, if failure of consideration, or other defence, is pleaded by the makers, the admissions of the payee of the note, whilst living, if they tended directly to benefit or injure herself, and only collaterally effected her husband, would be competent evidence for the defendants.

STATUTES CONSTRUED—EVIDENCE.—In section 3, of the act of 1861, (2 G. & H. p. 168,) the term, "confidential communications," seems to be limited to matters confided to attorneys, physicians and clergymen, and does not include communications between husband and wife, and the right to waive objections to their disclosure, therefore, does not apply to the latter.

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APPEAL from the *Bartholomew* Circuit Court.

PERKINS, J.—Suit by *John Prather*, administrator of the estate of *Eliza J. Cline*, deceased, against the makers of a note of the following tenor:

"\$800. On the 25th day of *December*, 1855, we promise to pay *Eliza J. Cline* eight hundred dollars, waiving relief laws of *Indiana*, for value received, this June 29th, 1854.

"C. BEVINS,

"L. H. SHUMWAY."

The defendant answered, setting up a failure of consideration, in this, that *John Cline* and *Eliza J. Cline*, who was *John's* wife, were the equal owners, as joint tenants, of a tract of land; that they united in the sale of it to *Charles Bevins*, one of the makers of the note sued on, (*Shumway* being his surety,) and made a joint deed for the same; that, as the consideration of the sale and conveyance, *Bevins* gave 800 dollars cash in hand, and the note in suit, which, for certain private personal reasons, the answer alleges, was made payable to *Eliza J.*, the wife of *John*, though it avers the same to be the joint property of the two. It further avers that, at the same time, and as a part of the contract, said *John* and *Eliza J. Cline* executed to said *Bevins* their joint bond of indemnity against the failure of the title to any of the land deeded; and that, in fact, *John Cline's* interest in the land was subsequently sold on execution, &c. *Bevins v. Prather*, 13 Ind. 392.

The plaintiff replied:

1. The general denial of the answer.
2. "That, at the time of said sale and conveyance of the land to *Bevins*, said *John Cline* and *Eliza J. Cline*, with the knowledge and consent of said *Bevins*, made an equal division of the proceeds of the sale, said *John* taking and receiving,

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as and for his share, and interest in said land, eight hundred dollars in cash, being half of the price of the land, and said *Eliza J. Cline* taking and receiving, with the consent of her husband, said note for eight hundred dollars, as and for her share, being the remaining half of the price of the land, said note being taken as her separate property," &c.

A demurrer to this reply was overruled, and exception taken.

The cause was tried by the Court, who found for the plaintiff the amount of the note and interest.

A motion for a new trial was denied. The evidence is in the record. It consisted of the note, the deed from *Cline* and wife to *Bevins*, a judicial record, and certain parol evidence. The judicial record was the judgment of avoidance of *Bevins'* title as far as derived from *John Cline*. The deed was the joint warranty deed of *John* and *Eliza J.* The parol evidence was this; *Reason Prather* testified that the price of the land in question was 1,600 dollars; that 800 dollars was paid to *John* for his interest, and the note of 800 dollars was given to *Eliza J.* for her interest. *Bevins* assented to such apportionment of the purchase-money. *Walter Prather* testified that *Eliza J.* left the note with him for collection, taking his receipt in her name for it; that after her death he handed it over to her administrator.

On the trial, the defendants offered themselves as witnesses, to prove the truth of the matters set up in their answer, but the Court held them incompetent under the code. They then offered to prove, by a competent witness, the admissions made in her lifetime, by *Eliza J. Cline*, the payee of the note sued on, touching those matters, "but the Court rejected the evidence of said admissions, on the ground that the said *Eliza J.* was the wife of said *John Cline*, and was, for that reason, incompetent," &c.

Preliminary to a discussion of the questions to be decided, a

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brief reference to some of the modes of ownership of property may aid us in obtaining clear and exact ideas of the points involved. Property may be owned absolutely, may be owned in trust, may be owned in severalty, and may be owned jointly. There were four kinds of joint tenancy at common law, viz: in common, in parcenary, in joint tenancy, and in tenancy by entireties. In this State, three of these kinds of joint tenancy may exist. Our code enacts:

"Sec. 7. All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy, and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

"Sec. 8. The preceding section shall not apply to mortgages, nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors, or trustees, as such, shall be held by them in joint tenancy." 1 G. & H. 259.

It had often—prior to 1852—been decided, in other States, that the statutes of such States, converting joint tenancies into common, did not extend to tenancies created by joint conveyances to husband and wife, and our statute, enacted subsequently to those decisions, expressly excepts such tenancies, leaving them at as common law. See 5 Mass. Rep. 521; 16 John. Rep. 110; 5 Halst. 42; 3 Rand. 179; 2 Black. (Shars. ed.) p. 182, note 10.

At common law, if a conveyance be made jointly to a man and woman, who are not married, they take by moieties, as joint tenants, and either can sever such joint tenancy by a conveyance of his or her moiety; but if a conveyance of land be made to a man and woman, who are then husband and wife, they take as joint tenants by entireties, not by moieties;

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they are seized *per tout* and not *per my*. Each, as well as both, is entitled to the use of the whole. Neither can sever the joint estate by his own act, as he can in case of an ordinary joint tenancy, but both must unite in the deed to effect a conveyance of any estate in any part of the whole. 2 Black. *supra*. In the case of *Stucky v. Keefe's Ex'rs*, 2 Casey (26 Penn. St. Rep.) 897, decided in 1856, the authorities on this point are collected. Nor, it would seem, could the separate interest of either be sold on execution. Indeed, there is no separate interest. See *Cox v. Wood*, 20 Ind. 54.

In a case, then, where husband and wife held real estate by a conveyance, made to them while married, a sale and conveyance by them of such estate would necessarily be joint, and the consideration joint and not several, and not severable, as consideration for the sale, though it might be divided afterwards. The evidence in this case does not show the origin of the title of *John and Eliza J. Cline*.

But in case of an ordinary joint ownership of property, as of a horse or a farm, we take it that each joint tenant may separately sell and convey his share for such separate consideration, resting on his own title, as may be agreed upon, or the law will settle; and, also, if such course is adopted, the joint tenants may unite in a joint sale and conveyance upon a joint consideration, resting upon the assumed joint title of all; and, in such a case, the subsequent division of the consideration among the sellers would not make it several as to the purchaser. As to him, the question would be, was the consideration several or joint, in the sale? or, had it been made so, as to the liabilities of the parties, by his agreement since. From what has been said, it appears to be questionable whether the reply to the second paragraph of the answer, in this case, was sufficient, supposing the answer to be good. But as the judgment must be reversed, and the case go back upon another ground, and the pleadings may be remodeled

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before another trial, we will pass to the rulings of the Court upon the questions of evidence.

There can be no doubt that the evidence offered was pertinent and material. Could it be got before the Court in the mode attempted?

We may observe that a wife is not bound by the covenants in her deed. Our code enacts:

"Sec. 6. The joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife, but not to bind her to any covenant therein." 1 G. & H. p. 258.

But this fact does not go to the question of consideration. A statute of this State, passed in 1861, (2 G. & H. 168,) by section 2, makes, as the general rule, all white persons, of competent age, witnesses. Section 3 declares the limitations and exceptions to the general rule, and is as follows:

"Persons insane at the time of examination, children under ten years of age, and incapable of properly understanding the facts about which they are examined; husband and wife as to matters for or against each other, or as to communications made to each other during marriage; attorneys at law as to confidential communications from a client, or advice given to such clients; physicians as to any matters confided to them in the course of the duties of their profession; clergymen concerning any confessions made to them in the course of discipline enjoined by the church, shall not, in either case, be included in the second section of this act, or be competent witnesses, unless with the consent of the party making such confidential communications: *Provided*, That where a negro, Indian, or person excluded on account of mixed blood is a party to a cause, his opponent shall also be excluded: *And provided further*, That in all suits where an executor, administrator, or guardian, is a party in a case where a judgment may be rendered, either for or against the estate represented by such executor, administrator, or guardian, neither party

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shall be allowed to testify as a witness, unless required by the opposite party, or by the Court trying the cause, except in cases arising upon contracts made with the executor, administrator, or guardian of such estate."

These exceptions are, to the extent of them, mainly a retention of common law rules.

1. Insane persons are incompetent at common law.
2. So, children under, &c., and incapable, &c.
3. So, husband and wife, &c.
4. So, attorneys, &c., as to confidential communications.

And as to this fourth specification, it may be observed, that the term, "confidential communications," as used in the section, seems limited to matters confided to attorneys, physicians, and clergymen; and, if so, the authority to waive objection to their disclosure, does not extend to matters between husband and wife. See *Gee v. Lewis*, 20 Ind. 149.

5. As to executors, &c., mentioned in the second proviso, the objection can be waived "by the opposite party;" and "the Court trying the cause," in its discretion, and of its own volition, may require both parties to testify.

Was, then, the evidence offered and rejected in this case, admissible at common law?

It will be observed, that it was not sought by the evidence to disprove the capacity of the plaintiff, and to prove the capacity of the husband to sue on the cause of action. The record presented no such issue. The capacity of the plaintiff to sue was admitted by the pleadings. The evidence was to go to the consideration of the note, and was rejected because "said *Eliza J.* was the wife of *John Cline.*" The evidence offered consisted of admissions made by the wife in her lifetime. It does not appear whether her husband was living or dead. If the wife could have been called to prove the matters offered to be proved in this case, had she been living, then it was competent to prove her admissions of those mat-

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ters, she being dead. 1 Green. Ev. sec. 841. While it is the general rule that husband and wife can not be witnesses for or against each other, it is also a general rule, at least, under the code, that they may be witnesses for and against themselves. *Palmer v. Henderson*, 20 Ind. 297. There are exceptions to the rule, even in civil cases, that they can not be witnesses for or against each other. If a husband makes his wife his agent, she may be a witness for or against him, as to acts done within the scope of the agency; at all events, her declarations, concurrently with, and explanatory of, such acts, will be evidence for or against him. So, they may be, if made in his presence. See *Casteel v. Casteel*, 8 Blackf. 290. But in this case, we think the admissions offered, as having been made by *Mrs. Cline*, operated against herself, and not against her husband. He was not a party to the suit, and how could the result of it directly have benefited or injured him? *Mrs. Cline's* admissions would, we may suppose, have tended to secure a judgment in her favor, or against her, in the particular suit. Suppose they had tended to secure a judgment in her favor, then the testimony would have operated in her own behalf, not for her husband; because the judgment would have been hers, not his. Suppose they had operated to defeat a judgment in her favor, then they would have been against her, not her husband; for if a judgment had been recovered, it would not have been his.

But, it may be said, if the judgment had been for the defendant in this case, the husband of *Mrs. Cline* might have been sued for a part of the consideration—800 dollars—which he had received. Suppose this to be true, as he was not a party to this suit, the record could not be used in a suit against him, nor could the evidence given on the trial. In such case, where the testimony of husband and wife affects them respectively, only collaterally, it is not inadmissible. See the cases collected in 2 G. & H. p. 170; *The Boone County*

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Bank v. Wallace, 18 Ind. 82; 1 Greenl. Ev. sec. 342; 1 Philip's Ev. 4 Am. ed. p. 84, *et seq.*

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

Martin M. Ray, for the appellants.

S. Stansifer, *C. E. Walker*, and *Geo. W. Richardson*, for the appellee.

BAYLIES *et al.* v. SINEX.

STATUTES CONSTRUED—MECHANIC'S LIEN.—Under sections 647 and 648 of the code, on the subject of mechanic's liens, no lien can be acquired upon specific articles furnished for a building, as distinct from the building, but only upon the building in which they are placed, or on the land whereon they are placed, or both.

APPEAL from the *Wayne Common Pleas*.

WORDEN, J.—This was an action by *Sinex* against *Blanchard*, *Bargeon*, *Baylies*, *Marchant* and *Baylies*, upon promissory notes executed by *Blanchard & Bargeon* to the plaintiff, and to enforce a mechanic's lien.

The plaintiff manufactured for and sold to *Blanchard & Bargeon* a certain boiler, at the price of 455 dollars, and took their notes for the amount. The plaintiff also, within the proper time, filed in the recorder's office notice of his intention to hold a lien upon the boiler. The boiler was placed in or attached to a machine shop owned by *Blanchard & Bargeon*, and was used to propel the machinery by steam. The notice, however, did not claim any lien either upon the machine shop or the ground on which it stood, but simply upon

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the boiler. Prior to the sale of the boiler, *Blanchard & Bargeon* had mortgaged the premises on which the shop stood to one *Pyle*. This mortgage was duly recorded, and before the bringing of this suit was foreclosed and the premises sold, *Baylies, Marchant & Baylies* becoming the purchasers, and receiving the sheriff's deed therefor. The latter named persons were in the possession of the premises, including the boiler, when this suit was brought.

The Court rendered judgment against *Bargeon* upon the note, and that the boiler be sold, &c. *Baylies, Marchant & Baylies* appeal.

It may be observed that, if the boiler was so attached to the machine shop as to become a part of the realty, the title passed to the appellants, they having purchased under a lien prior to that of the plaintiff. But supposing the boiler be regarded as personalty, and as not passing under the sale thus made, the question arises whether the plaintiff could acquire a lien upon it as personalty, separate and distinct from the building or ground upon which it stood, under the provisions of the statute on the subject of mechanic's liens. The following provisions are the only ones that seem to bear upon the question :

"Sec. 647. Mechanics, and all persons performing labor, or furnishing materials for the construction or repair of any building, or who may have furnished any engine or other machinery for any mill, distillery or other manufactory, may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any buildings, mill, distillery or other manufactory, for which they may have furnished materials of any description, and on the interest of the owner of the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both.

"Sec. 648. The provisions of this act shall only extend to

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work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, distillery or other manufactory, unless furnished to the owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest."

Section 652 provides, amongst other things, that the Court may, by the judgment, direct a sale of the land and building for the satisfaction of the liens and costs. 2 G. & H. p. 298.

It is evident that the 647th section, above set out, does not give a lien upon the engine or other machinery furnished, as distinct from the building, but only upon the building, or the lot or land upon which it stands. The 648th section is somewhat obscurely worded, but it does not, as we think, extend the remedy given by the preceding section, but rather limits or qualifies it. It limits the remedy given by the preceding section, first, to cases where work has been done or materials furnished on new buildings; second, to cases where contracts have been entered into with the owners of buildings for repairs; third, to cases where engines or other machinery have been furnished, &c., to the owner of the land; excluding all contracts with tenants, except only to the extent of their interests. Its object was, undoubtedly, to prevent a tenant from encumbering property with liens, except to the extent of his interest in the property. *Lynam v. King*, 9 Ind. 8.

We are of opinion that the statute does not give a lien on specific articles furnished for a building, as distinct from the building, but only on the building or ground on which it stands. This view is strengthened by the fact that provision is made for rendering judgment for the sale of the land and building, but none for the sale of property distinct from the land or building.

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Per Curiam.—The judgment below for the sale of the boiler is reversed, with costs.

Bickle & Burchenal, for the appellants.

H. B. Payne and *J. P. Siddall*, for the appellee.

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THE INDIANA CENTRAL RAILWAY CO. v. MUNDY.

RAILROADS—LIABILITY—EXEMPTION.—Where a person traveling on a railroad receives from the company a free pass, upon which is indorsed a statement that, "it is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company," such indorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; and it would seem that such agreement does not cast upon such person any risks arising from any negligence of the servants of the railroad company in running the trains.

APPEAL from the *Marion* Circuit Court.

WORDEN, J.—This was an action by *Mundy* against the company to recover damages for an injury received by him while riding upon a train of cars of the defendant, through the alleged carelessness of the agents of the company. Verdict and judgment for the plaintiff.

The facts are briefly these: The plaintiff shipped on board the defendant's cars, at *Indianapolis*, a steam fire engine, to be transported to *Richmond*, on which he paid the freight. He also, being desirous of accompanying the engine, with his assistant, procured from the company, without further con-

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sideration than the freight on the engine, a pass, in the following terms, viz:

“CONDUCTORS: Pass free *F. Mundy* and *S. Wicks* from *Indianapolis* to *Richmond*.
J. S. NEWMAN,

“Pres’t Ind. Central Railway Co.”

(Turn over.)

On the back of which were printed the following words: “It is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company.”

About the time the train on which the engine was placed was about to start, the plaintiff entered a passenger carriage which was attached to the back end of the train, having inquired and being told that that car was going to *Richmond*. The train started with the carriage which the plaintiff had entered attached. The train proceeded a short distance when an employee of the company told the plaintiff to get into the car ahead if he was going in that train. The plaintiff went from where he was then standing and got his carpet sack, &c., and went out upon the platform of the car and stepped with one foot across upon the car ahead, but before he could get across upon the other car as directed, the passenger car slackened its speed and separated from the other, the pin or bolt connecting them having been withdrawn without the plaintiff’s knowledge, and the plaintiff fell upon the track between the cars, and was run over and severely injured by the passenger car. The car was thus detached by an employee of the company for the purpose of leaving it.

A new trial was asked on the ground that the verdict was not sustained by the evidence, and because the Court erred in giving the fifth, sixth and eighth instructions, and in qualifying the fifth instruction asked by the defendant, as will be hereafter stated.

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These several instructions are as follows:

"No. 5. The indorsement upon the pass given to the plaintiff can not relieve the railroad company from responsibility for injuries sustained by the plaintiff in consequence of gross negligence in running and managing the train."

"No. 6. The indorsement upon the pass can not relieve the railroad company from responsibility for injuries sustained by the plaintiff in consequence of the gross and willful negligence and mismanagement of the agents of the company in running and arranging the train."

"No. 8. The indorsement upon the pass given to the plaintiff can not be construed as stipulating for willful misconduct, gross negligence, or want of ordinary care in the running and management of the train by the agents of the company; if it were competent for the company to stipulate for the gross negligence of her agents, it could be done only in terms that would leave no doubt as to the meaning of the parties."

The fifth instruction asked by the defendant is as follows:

"If the jury find from the evidence that the plaintiff received from the defendant the pass set out in the third paragraph of the complaint, and in the defendant's answer, indorsed on the back as therein stated, and the plaintiff could read the same, said pass and condition amounted to a contract between the plaintiff and defendant, which it was competent for the parties to make, and the defendant would not be liable for the injuries received by the plaintiff while he was riding upon said train and using said pass." This charge was given, but the Court added at the end, "except for willfully gross negligence on the part of the defendant."

Counsel have discussed the question whether a common carrier can by contract exempt himself from liability for the consequence of his negligence. We shall not, in the present case, decide that question, it being unnecessary to do so. We may remark, however, that the authorities upon the point

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seem to be conflicting. In a late case in *New York* it was held that such a contract with a gratuitous passenger was valid. *Wells v. The New York Central R. R. Co.*, 24 N. Y. 181; vide also *Perkins v. Same*, *id.* 196. It is thought that the weight of American authorities is the other way, but we pass this point without expressing any opinion upon it either way.

We go back to the terms of the pass or contract in question. By that the plaintiff "assumed all risk of personal injury and loss or damage to property whilst using the same on the trains of the company." Without undertaking to determine precisely what risks the plaintiff assumed by this contract, we think it clear, under the authorities, that he did not assume any risks arising from the gross negligence of the servants of the defendant in running the train. It may be that there is no foundation for the classification of the degrees of negligence, as "slight," "ordinary," and "gross," and that we should say negligence without the epithet "gross." Vide the cases above cited from *New York*, also *Story on Bailment*, sec. 17 and note.

The following authorities on the construction of the contract seem to us to be in point and decisive. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. U. S. 844. There one *Harnden* had shipped goods with a carrier to be transported. The Court say, (p. 888): "The special agreement in this case, under which the goods were shipped, provided that they should be conveyed at the risk of *Harnden*; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the sea

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worthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties."

In that case the language of the contract was much broader than in the case at bar. There it was not only stipulated that the goods should be at the risk of *Harnden*, but it was further agreed that the respondents were not to be liable in any event for loss or damage. In *Wells & Tucker v. The Steam Navigation Company*, 4 Selden 375, it was held that, where a boat was to be towed "at the risk of the master and owners," the contract had reference to the perils of navigation not arising from the gross negligence of the contractor. "That a stipulation in a contract to exempt from gross negligence must be specific and distinct. It will not be implied from a clause containing a general expression which might otherwise be so construed." To the same effect is the case of *Wright v. Gaff*, 6 Ind. 416. There a flat boat was to be towed at the risk of the owner. It was held that the steamer towing the boat was liable for gross negligence.

The above cases in Howard and Selden are approved in *Perkins v. New York Central Railroad Company*, *supra*, p. 206. *Vide*, also, *Pennsylvania Railroad Company v. McClosky's Adm'r*, 23 Penn. 526.

The contract in question not exempting the railroad company from the consequences of gross negligence, but little more need be said in the case. We have not examined the charges given at the instance of the plaintiff very critically, though in the main they appear to be correct; but if they were not altogether accurate they were set right by the sweeping charge given at the instance of the defendant, with the

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qualification appended by the Court. By this charge the Court told the jury that, under the contract, the defendant would not be liable "except for willfully gross negligence on the part of the defendant." Of the charges, taken all together, we think the defendant has no just ground of complaint.

On the evidence, we can not disturb the judgment.

Per Curiam.—The judgment below is affirmed, with costs.

Newcomb & Tarkington, for the appellants.¹

Thomas A. Hendricks and *B. K. Elliott*, for the appellee.²

(1) The counsel for the appellant argue: Such contracts as that indorsed upon the ticket in this case become obligatory upon the persons receiving the same, and operate to limit the common law liability of the carrier, and should be construed according to their plain and obvious import. *Austin v. Midland Railway Co.*, 70 Eng. Com. L. R. 454; *Shaw v. North Midland Railway Co.*, 13 Q. Bench R.; *The York, Newcastle and Berwick R. R. Co. v. Crisp*, 14 Com. Bench R. 527. The validity of such contracts has been recognized by the Supreme Court of the *United States*. 6 Howard U. S. R. 344. They have been directly adjudged to be valid by the Court of Appeals in *New York*. 24 N. Y. R. 181; *id.* 196. The subject and authorities have received further and learned consideration in 1 Parsons on Contracts, 703, *et seq.*

If the injury complained of could have been avoided by the exercise of ordinary vigilance on the part of the ticket holder, he is not entitled to recover. Redfield on Railways, 331 *et seq.*; 11 East. R. 60; 1 Stark R. 493; 9 Met. 1; 4 Smith's N. Y. R. 248; 15 Ills. R. 468; 16 *id.* 558; 19 Ga. R. 440; 17 Barb. R. 94; 21 *id.* 339; 5 Ind. R. 340; 15 *id.* 120; *id.* 487.

(2) The counsel for the appellee argue: Carriers of passengers can not by contract exempt themselves from liability for damages arising from gross negligence of themselves or their servants. 1 Parsons on Cont. 771, note; Redfield on Railways, 272 *et seq.*; 6 Ind. R. 416; 23 Penn. St. R. 526; *Smith v. New York Central Railway Co.*,

 Ford v. Mitchell.

24 N. Y. R. 222; 29 Barb. R. 132; *id.* 602; 6 How. U.S. R. 344; 4 Selden 375; 5 East. R. 428; 5 Blackf. 222.

The condition on the back of the pass formed no part of the contract. It is well settled in this country that a carrier can not, by notice, limit his liability, but may do so by special contract. Redfield on Railways 268; Story on Bail. 552, § 554; 11 Cush. (Mass.) R. 97; 2 Camp. R. 415; 2 Stark. R. 279; *id.* 53; 5 Bing. 212; Ang. on Carriers, sec. 244; Greenl. on Ev. p. 215.

 FORD v. MITCHELL.

PRACTICE—BILL OF EXCEPTIONS.—In a bill of exceptions, the words, "the foregoing was all the evidence given in the case," are not sufficient, under rule 30 of this Court, to exclude the presumption of other evidence.

COMMON CARRIERS, DELIVERY TO.—The mere fact that goods were delivered to and received by the deck hands of a steamboat is not sufficient to charge the owners as common carriers, unless it be shown that such persons were authorized to receive freight, or that the same was delivered to them in pursuance of some special contract or usage; and, in a given case, otherwise fully established, it will not be sufficient to remove the necessity for such proof for the Court or jury to find that the manner of the reception of the freight by the deck hands was such that the officers, whose duty it was to receive goods for transportation, must, if they had exercised reasonable attention, care and diligence, have known that the freight was in the boat, and have received it.

APPEAL from the *Floyd* Common Pleas.

DAVISON, J.—*Mitchell* who was the plaintiff, sued *Ford*, alleging that defendant was a common carrier, by a steamboat, called *L. C. Ferry*, of which he was the owner, and which was employed and run on the *Ohio* river, from *Louisville, Ky.*

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to *Evansville, Ind.*, touching at all intermediate shipping points; that plaintiff, on *August 17, 1860*, caused to be delivered to the defendant, as such carrier, a box, containing dry goods, jewelry, &c., to be taken care of, and safely carried, by him, from *Owensboro*, an intermediate shipping point, &c., to *Louisville*, aforesaid, and there to be safely delivered, &c. It is averred that the defendant, although, as such carrier, he had received the box with its contents, for the purpose aforesaid, did not safely convey the same from *Owensboro* to *Louisville*, nor did he safely deliver the same, &c., but, in respect to the box and the contents thereof, behaved himself so negligently, &c., that the same were and are wholly lost to the plaintiff. The defendant answered by a denial. The issues were submitted to the Court, who found specially as follows:

1. The defendant was a common carrier, for hire, by the steamboat *L. C. Ferry*, on the *Ohio river*, from *Evansville* and intermediate landings, of which *Owensboro* was one, to *Louisville*.

2. The plaintiff, being the owner of a box of dry goods, &c., caused the same to be placed on board said steamboat, from the wharf-boat at *Owensboro*, directed to *Liber, Griffin & Co.*, as consignees thereof, at *Louisville*, on the 17th of *August, 1860*, when the steamboat aforesaid was on her regular trip, &c.

3. The box in question, with another from the same owner, for delivery at *Louisville*, was at the same time received on board the *L. C. Ferry*, by the deck hands and employees of the boat, in such manner, that with reasonable attention, care, and diligence of the clerk and proper officers of the boat to receive freight, according to their duty, they must have known of the same, and have received the goods for transportation, for hire, to the consignees at *Louisville*.

4. Neither the box, nor any of the contents thereof, were ever delivered to, or received by, said consignees, although

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the other box, shipped at the same time, was duly received, &c.

5. The box and contents were of the value of 255 dollars.

To each of these special findings, the defendant excepted. The Court, also, found generally for the plaintiff, and assessed his damage at the above sum. Motion for a new trial denied, and judgment, &c.

The causes for a new trial are thus assigned:

1. The finding is contrary to law.
2. It is unsupported by the evidence.

There is a bill of exceptions, which, after setting out certain testimony, avers, that "the foregoing was all the evidence given in the case." This is not within the requirements of rule 30 of this Court. Under that rule, we have decided, in effect, that the words, "this was all the evidence given in the cause," are alone sufficient "to repel the presumption of other evidence." *Branham v. Bradford*, 17 Ind. 47; *Smith v. Anthony*, 16 Ind. 267; *Carlin v. Martin*, *id.* 259; *Rader v. Bar*, 7 Ind. 194. The evidence, then, not being in the record, the second alleged cause for a new trial is not available. But the appellant contends, that upon the facts specially found by the Court, the plaintiff is not entitled to recover, because the findings do not, in point of law, allow the conclusion that the box was delivered to, and received by, the defendant, as a common carrier. "In order to charge a common carrier, as such, there must be a delivery to him, his servants or agents, of the article for transportation; and, if the delivery is made to a servant, it must be one who is entrusted to receive and accept the goods, and not to a person engaged in other duties." Angel on Car. sec. 129, *et seq.*; 3 Ph. Ev. Am. ed. p. 320, note 903; *Blanchard v. Isaacs*, 3 Barb. 388; *Trowbridge v. Chapin*, 23 Conn. 595. In the case last cited, it was held that "the common hands, or crew, of a vessel, have no general authority, as agents of the owners, to

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receive goods for transportation." Where, however, "the carrier agrees that property, intended for transportation, may be deposited, at a particular place, without any express notice to him, such deposit, merely, would amount to constructive notice, and a sufficient delivery. And such agreement may be shown by proof of a constant practice and usage, by the carrier, to receive property, left for transportation, at a particular place, without any special notice of such deposit." *Merriam v. Hartford, &c., R. R. Co.*, 20 Conn. 354; Story on Bailments, secs. 532, 533; *Packard v. Getman*, 6 Cowen, 757.

How, then, stands the case at bar? The Court do not find that the deck hands were authorized to receive freight, nor does it appear that the box was delivered pursuant to any special contract or usage. But it did, in effect, find that the manner of the reception of the box, by the deck hands, was such, that the officers, whose duty it was to receive goods for transportation, must, if they had exercised reasonable attention, care and diligence, have known that the box was in the boat, and have received it. This finding is not, it seems to us, sufficient to charge the carrier. No special contract or usage, applicable to the case, having been found, it should appear, affirmatively, that he or his agents, for the reception of freight, had been expressly notified of the deposit of the box in his steamboat. This conclusion is fully sustained by the authorities to which we have referred. And, as no such notice has, in this instance, been found by the Court, the findings do not support the judgment. *Tower v. The Utica, &c., R. R. Co.*, 7 Hill 47; *Miles v. Cattle*, 6 Bing. 743; *Edwards on Bailments*, p. 451.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Randall Crawford and *Henry Crawford*, for the appellant.

John H. Stotsenburgh and *Thomas M. Brown*, for the appellee.¹

(1) No briefs are with the record.

Palmer et al. v. Whitney, President, &c.

PALMER *et al.* v. WHITNEY, President, &c.

PROMISSORY NOTES—LIABILITY OF INDORSERS.—Where *A* draws a bill of exchange on *B*, (who accepts it,) payable to the order of *C*, who indorses it to *D*, and *D* indorses it back to *C*, the latter can maintain no action thereon against *D*.

SAME.—But where *A* draws a bill of exchange on *B*, (who accepts it,) payable to the order of *C*, who indorses it to *D*, who indorses it back to *C*, all on the day of its date, and the latter, before its maturity, indorses it, and procures it to be discounted, on his own account, by a bank, such bank may maintain an action upon it against *D*; because, in the latter case, the transaction imports, upon its face, that the subsequent indorsement was made for the accommodation of the prior indorser, *C*.

SAME—NOTICE OF PROTEST.—It is enough to bind the indorser, if the holder of a bill make diligent inquiry for the indorser, and act upon the best information he can procure. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interests depend upon obtaining correct information.

SAME.—Where a bank, discounting a note or bill, inquires of the person presenting it as to the residence of the indorser, and sends notice to the place named by him, this is due diligence, and sufficient to charge the indorser, though he never resided there, or had removed to another place.

NOTARY, NOTICE BY.—A notary, in giving notice of protest, does not act officially, but as the agent of the holder of the bill, and, therefore, his signature to the notice, without attestation by his seal of office, is sufficient.

APPEAL from the *Bartholomew* Circuit Court.

DAVISON, J.—The appellee, who was the plaintiff, sued *Geo. W. Palmer* and *Thos. J. Richards*, alleging in the complaint that the defendant, *Palmer*, on the 10th of *August*, 1857, at *Bartholomew* county, drew a bill of exchange on *Burris Moore*, and thereby required him, three months after the date thereof, to pay to the order of *J. Lakin*, at the Bank

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of *Louisville*, in the State of *Kentucky*, 1,000 dollars, value received; that on the day of the date of the bill *Moore*, the drawee, accepted it, and *Lakin*, the payee thereof, indorsed and delivered the same to the defendant, *Richards*, who afterwards, on the same day, indorsed and delivered it to said *Lakin*, and that *Lakin* afterwards, and before the maturity of the bill, for value received, indorsed it to the plaintiff, who, when the bill matured, presented it for payment at the place where payable, and demanded payment, but payment thereof was refused, and the same was protested for non-payment. It is averred that on or about the time of the indorsement to *Richards*, he resided in said county, and his post office address then, or about that time, was at *Columbus*, in said county; that *Lakin*, when he sold and indorsed the bill to the plaintiff, was inquired of, by the plaintiff, where the drawer and indorsers resided, and he, *Lakin*, in answer to that inquiry, then and there stated that *Richards* resided in *Bartholomew* county, and his post office address was *Columbus*, and that plaintiff, upon the presentation and non-payment of the bill, instituted further inquiry as to the residence and post office address of *Richards*, and was told by persons who knew him, and where he resided, shortly before that time, that he resided in said county, and that *Columbus* was his post office address; and further, it is averred that plaintiff, on the 14th of *November*, 1857, the day on which he received notice of said protest, put in the post office at *Madison, Indiana*, post paid, notices to *Palmer* and *Richards*, severally, of the presentment, non-payment and protest aforesaid, and that he did not learn that *Richards* had removed from said county until after the commencement of this suit. And the plaintiff, in fact, says that the sum specified in the bill, with interest, &c., is due and unpaid; wherefore, &c. *Richards*, one of the defendants, demurred to the complaint; but his demurrer was overruled, and he excepted. The defendants answered

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by a denial. The Court tried the issues and found for the plaintiff. Motion for a new trial denied, and judgment.

As has been seen, *Lakin*, the payee, indorsed the bill to the defendant, *Richards*, who indorsed it back to *Lakin*, and he indorsed it to the plaintiff; hence it is argued that *Lakin*, having become the indorsee of *Richards*, was placed in his original position of payee and first indorser, and could not, therefore, have held *Richards* liable on his indorsement; and, that being the case, *Richards* is not liable to the plaintiff, because the plaintiff, as indorsee of the bill could have no right of action against *Richards*, not held by *Lakin* when he indorsed it. We are referred to Chitty on Bills, p. 442, where it is said that, "unless under circumstances which must be specially stated on the record, no action can be maintained on a bill against a person who became a party subsequently to the holder, or plaintiff, for if it were otherwise the defendant in such action might, as indorser, deriving title from the plaintiff, be entitled to recover back again in another action against the plaintiff, the identical sum which the plaintiff had previously recovered from him, which would introduce a circuituity of action; and, therefore, where *A* having brought suit against *B*, on a promissory note made by *C* to *A*, and indorsed by him to *B*, and by *B* again indorsed to *A*, and having obtained a verdict, the judgment was arrested." See, also, *Bishop v. Hayward*, 1 T. R. 470, and *Mainwaring v. Newman*, 2 Bos. and Pul. 125. These authorities are referred to by Judge Story in his treatise on bills, &c., with seeming approval. Story on Bills of Exchange, sec. 218. In this case the bill, with its indorsements, was filed with the pleading; they are in the usual form, and it must be conceded that, in the complaint, there is nothing specifically stated, which, in any degree, tends to show that the indorsements were made, under any circumstances, other than those which ordinarily attend such transactions. If, then, the authorities to which we have

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been referred express the law, and we think they do, it is very clear that *Lakin*, when he indorsed to the plaintiff, could not have maintained an action against *Richards* as his indorser. Can the plaintiff in this action recover against *Richards* as a party to the bill? The appellee contends that, in view of the alleged facts, it must be presumed that the indorsement of *Richards* was made by him to enable *Lakin* to raise the money by the negotiation of the bill, and that he was, therefore, a mere accommodation indorser, and as such, though he was not responsible to *Lakin*, is liable to the plaintiff. There are authorities in support of that position. Thus, in *Mauldin v. Branch Bank*, 2 Ala. 502, it was decided that, "if a prior indorser offer a note to a bank to be discounted, on his own account, the transaction imports upon its face that the subsequent indorsement was made for the accommodation of the prior indorser." See, also, *Wallace v. Branch*, 1 Ala. 565. These decisions are cited and relied on in *Runyon v. Reed*, 6 Am. Law Reg. p. 302, which was an action against *Isaac Reed*, upon a promissory note made by *Osmon Reed* in favor of *James Whetham*, who indorsed it to the defendant, who indorsed to the maker, and he, before the maturity of the note, indorsed it to *Runyon*, the plaintiff. Held, that the indorsement of the maker was, when standing unexplained, evidence that the indorsements prior to his name were for his accommodation. The principle involved in the decisions to which we have just referred evidently applies to the case at bar, and we are inclined to follow them. In the absence of contrary proof, it must be presumed that *Richards* indorsed the bill for the mere purpose of enabling *Lakin* to raise the money by its negotiation. This conclusion seems to be consistent with the present mode of making and indorsing a bill of exchange, intended to be discounted at a bank, for the use of one of its parties, and the result is, we must, in view of the case made by the complaint, regard the defendant an indorser

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for the accommodation of *Lakin*, and as such liable to the plaintiff.

The next question to settle is, was the the notice of protest sufficient? The record does not, as required by rule 30 of this Court, purport to contain "all the evidence given in the cause." But the evidence before us, so far as it relates to the notice, proves, in effect, the same facts alleged in the complaint. The facts proved are as follows: *Richards* for many years resided in *Bartholomew* county, but some five months prior to the time he indorsed the bill removed from that county to *Tipton* county, became a resident of the last named county, and has continued ever since to reside therein. His post office address, while he resided in *Bartholomew* county, was *Columbus*, where he was well known. Afterwards, and while his residence was in *Tipton* county, his post office address was *Tipton*. The bill was drawn at *Columbus*, and there indorsed by *Richards*, who was then at *Bartholomew* county on a visit. The bank, of which the plaintiff is president, is at *Madison*, about forty-two miles from *Columbus*. Between these places there is a daily communication by railroad, and also a communication by telegraph. The plaintiff had acquaintances and correspondents in *Columbus* when the bill became due, and might, by writing to them, have ascertained the post office address of *Richards* in less than twenty-four hours. When *Lakin* presented the bill for discount he stated, in answer to an inquiry addressed to him by the plaintiff, who was then the president of the bank, that *Richards* was a farmer living in *Bartholomew* county, near *Columbus*. On the evening of the day on which the bank received notice of the protest, the plaintiff, who was still the president, &c., inquired of one *Huffman Barton*, who had formerly resided in said county, as to the post office address of *Richards*, and was informed by him that it was at *Columbus*, that he, *Barton*, knew where *Richards* lived, and had been at his

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house. And on the same evening the notice was put into an envelope, addressed to *Thomas J. Richards*, at *Columbus*, and deposited in the post office in *Madison*.

Are these facts sufficient to charge the indorser? The notice of the non-payment of the bill was not directed to him at his nearest post office. But was that essential? It is said to be "enough that the holder of a bill make diligent inquiry for the indorsers, and acts upon the best information he can procure. If, after doing so, the notice fail to reach the indorser, the misfortune falls on him and not on the holder. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interest depends upon obtaining correct information. The holder must, however, act in good faith, and not give credit to doubtful information when better could have been obtained." *Bank, &c. v. Bender*, 21 Wend. 642. Thus, "where a bank, on discounting a note or bill, inquires of the person presenting it as to the residence of the indorser, and sends notice to the place named by him, this is due diligence and sufficient to charge the indorser, though he never resided there, or had removed to another place." *Edwards on Bills, &c.*, p. 609, and cases there cited. These authorities, it seems to us, enunciate a correct exposition of the law. Do they apply to the case at bar? The plaintiff, as we have seen, inquired of the person who presented the bill for discount as to the residence of the indorser, and was informed "that he resided near *Columbus*, in *Bartholomew* county." For aught that appears in the evidence, he had no reason to doubt the correctness of this information. And, having made further inquiry of a person who professed to know, was told that the indorser's post office address was *Columbus*. This, we think, was an exercise of ordinary diligence. As holder of the bill the plaintiff was not, in our opinion, required by any rule of law to make further inquiry as to the defendant's residence. And though

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in point of fact he did not reside "near Columbus, in Bartholomew county," the notice, as directed and sent, was sufficient. *Ransom v. Mack*, 2 Hill 587; *Bank of Utica v. Davidson*, 5 Wend. 587; *Dikens v. Beal*, 10 Peters 572.

There is, however, another ground on which the notice of protest is said to be defective. It is in the usual form and signed by the notary who protested the bill, but the alleged defect is that it does not bear his official seal. This objection is not well taken. The statute, it is true, requires "all notarial acts" to be attested by a seal. 1 R. S. p. 877, § 4. But a notary, when he gives notice of protest, does so, not officially, but as agent for the holder of the bill, and thus acting as agent, his mere signature to the notice, without attestation by his seal of office, is sufficient. *Harris v. Robinson*, 4 Howard 346; *Warren v. Gilman*, 17 Maine 360; *Bank, &c. v. Smith*, 18 Johns. 230; *Crawford v. Branch Bank*, 7 Ala. 205; *Cowperwait v. Sheffield*, 1 Sandf. 416; Edwards on Bills, &c., 628.

Another point is made by the appellant in his brief, but it does not appear to have been presented to the Circuit Court for its consideration, and will not, therefore, be noticed in this Court.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.¹

S. Stansifer, for the appellant.

F. T. Hord, for the appellee.

(1) No brief with the record.

McDougle et al. v. Gates et al.

McDOUGLE et al. v. GATES et al.

PLEADING.—An answer setting up, in bar of a whole cause of action, a matter which constitutes a bar to only a part of it, is bad. For forms of answers and replies in such case, see the opinion at length.

DISCONTINUANCE—WAIVER.—An appearance, after a discontinuance, waives it; and the taking of final judgment for the unanswered part of a cause of action, at any time during the term, will prevent a discontinuance, if such judgment be taken before the entry of judgment of discontinuance.

APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—Suit upon a note. The defendants answered, nominally, in bar of the whole complaint, that, “as to all of said sum of money sued for, except 100 dollars, they fully paid the same, before the commencement of this suit, viz: on the 10th of *December*, 1860.”

This answer purported, in its commencement, as we have said, to go in bar of the whole cause of action, when the facts set forth in it were only a bar to a part of it. For this reason, the answer was bad.

The answer might have been thus: The defendants come, and for answer to all of the plaintiffs’ cause of action, except the sum of 100 dollars, they say they have paid, &c.

The plaintiffs, however, did not demur, but replied, in denial, without craving judgment for the answered part, viz: “The plaintiffs, for reply, deny that any part of said note has been paid.”

The reply might have been thus: The plaintiffs, as to all of their cause of action which remains unanswered, viz: the sum of 100 dollars, pray judgment, and as to the answer to the balance of said cause of action, they deny each and every allegation contained therein.

The next entry after the reply in denial is this: “And thereupon this cause is submitted to the Court for trial.”

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After this was done, the record says "the defendants entered a special appearance for the sole purpose of moving the Court to enter a judgment of discontinuance herein," but the Court overruled the motion, heard the cause, and rendered final judgment for the whole cause of action sued on. The appellants cite to show that the cause was discontinued by the failure of the plaintiffs to pray judgment for the part of the cause of action unanswered by the answer. 3 Black. Comm. 296; Steph. on Pl. 216; Bouvier's Dic. *p. t.*; *Hope v. Acher*, 7 Abb. (N. Y.) Rep. 308; Bacon's Abr. vol. 7; Tit. Pleading; 8 Blackf. 89; *Rose v. Comstock*, 17 Ind. 1. We may cite, in addition, to the point that a general appearance, after a discontinuance, waives it, *Clark v. The State*, 4 Ind. 268; and to the point that taking final judgment for the unanswered part of the complaint, at any time during the term, may prevent a discontinuance, if such judgment be taken before the entry of judgment of discontinuance, *Bayless v. Tousey*, 20 Ind. 151.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

John S. Scobey and *Will. Pound*, for the appellants.

Samuel Bryan, for the appellees.

CARMICHAEL v. SHIEL.

CASE DOUBTED.—The case of *Cromwell v. Wilkinson*, 18 Ind. 365, as to effect of remission by the plaintiff of a part of the damages recovered, is left open for reconsideration.

PRACTICE IN THE SUPREME COURT.—Where the bill of exceptions states the order of events in the trial of a cause differently from

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the journal entry on the record of the Court, the former must govern, so far as the record in this Court is concerned.

SLANDER.—Where the persons who hear a charge of larceny, complained of as slanderous, know the transaction referred to in the charge, know that that particular transaction is the one referred to as the ground of the charge, and know that that transaction was not larceny, no action for slander can be maintained; but, if the hearers understood the defendant to repeat the charge, without reference to the transaction as understood by them, and upon what he might assume to know beyond their knowledge, then the words might constitute a slanderous charge.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—*Margaret Shiel* sued *Jesse D. Carmichael*, alleging that he had charged her with stealing certain of his dishes from the *Palmer House*, and maliciously prosecuted her upon the charge.

Carmichael answered, the general denial, justification, and other paragraphs, setting out all the facts specially. Issues were properly formed. The cause was tried by a jury, who returned a verdict of 1,000 dollars for the plaintiff. A motion for a new trial was made; and, says the journal entry of record, the plaintiff thereupon remitted 300 dollars of the damages, whereupon the Court overruled the motion for a new trial, and rendered judgment against the defendant for 700 dollars; and counsel, in their brief, say they made the remission to prevent the granting of a new trial. If this were so, it would constitute, according to *Cromwell v. Wilkinson*, 18 Ind. 365, an error for which we might reverse the judgment. The practice is different in *Ohio*. *Wright's Rep.* pp. 227, 705. The ruling in *Cromwell v. Wilkinson* would seem to be correct on principle; yet as there are authorities the other way, the point had better be left open for reconsideration.

But the bill of exceptions states the order of events differ-

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ently from the journal entry, and makes the remission the voluntary act of the plaintiff, after the motion for a new trial had been overruled. The bill of exceptions must govern, so far as the record is concerned. See *Doe v. Smith*, 1 Ind. 451. We might, perhaps, act upon the admission of counsel, though in this case the question is unimportant, as will appear by what we have further to say in this opinion.

On the trial, the Court instructed the jury, that there were cases of slander in which it was proper for the jury to give vindictive damages. Whether this instruction is correct, deserves to be gravely considered. It has not been discussed by counsel in this case, and we shall express no opinion upon it. See *Cromwell v. Wilkinson*, 18 Ind. 865, on page 369. The branch of the plaintiff's suit, which complained of a slander, arose in this way: *Margaret Shiel* was in the service of *Mr. Carmichael*, the landlord of the *Palmer House*, in *Indianapolis*. While so in his service, she broke certain dishes belonging to the house. *Mr. Carmichael* deducted the price of the dishes thus broken from *Margaret's* wages, and she acquiesced in the deduction. Soon afterward, *Margaret*, openly, in the daytime, took the fragments of the broken dishes, and carried them away, claiming them as her property, as she had paid the full price of them, as if they had been unbroken. *Mr. Carmichael* then went before *Mr. Justice Fisher*, and instituted a prosecution against *Margaret* for larceny. The case was heard before *Esquire Fisher*, and he discharged *Margaret*, holding the taking of the dishes, under the circumstances, not to be larceny. Immediately after the discharge by the justice, and whilst the parties were still in the office, (*Margaret*, however, being near the exit door,) *Mr. Carmichael* advanced toward her and said, "Now I want you to bring back the dishes you stole from my house." From the evidence in the case, it is not clear whether any one, except the persons

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who had heard the evidence on the trial, heard *Mr. Carmichael's* words or not.

The words thus used are the ground of the paragraph for slander in this suit of *Margaret* against *Carmichael*. In reference to this branch of the case, the defendant, at the proper time, upon the trial, asked the Court to give this instruction to the jury, and the Court refused it, the defendant excepting:

"If the plaintiff has proved the speaking of any one set of the words laid in the complaint, and such words were spoken immediately after the trial of *Margaret*, before Justice *Fisher*, and she, the plaintiff in this suit, had been acquitted of the charge, and all the persons there present, and hearing the words spoken by defendant, *Carmichael*, had heard the evidence on said charge of larceny, and the words so spoken by defendant referred to the same dishes named in the affidavit on which the plaintiff was tried, and the taking, charged on the plaintiff, did not amount to a larceny, and so the persons, present and hearing the words spoken by defendant, knew and understood, the speaking of the words by the defendant was not slanderous."

The instruction was applicable to the evidence, was not embraced in any instruction given, and if law, should have gone to the jury. We think the instruction expressed the law. We think the spirit of the authorities may be thus expressed on this point:

Where the persons who hear a charge of larceny, complained of as slanderous, know the transaction referred to in the charge, know that that particular transaction is the only one referred to as the ground of the charge, and know that that transaction was not larceny, but simply innocent, or a trespass, no action for slander can be maintained. The charge is a mere misnomer, in a legal point of view, of a transaction, but conveys no charge of crime to the public ear, in no manner puts the person charged in peril of the consequences of

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crime. *Ausman v. Veal*, 10 Ind. 355. Whether the words used in this case did refer, as the hearers all understood, to such a transaction, should, we think, have been left to the jury. In the event that all the hearers did so understand the words, the case might be considered as though *Mr. Carmichael* had included the evidence on the trial, which had just been heard by the bystanders, in his charge of stealing the dishes; as though he had said, I want you to bring back the dishes you stole from my house in the manner and under the circumstances which have just been explained to this audience on your (*Margaret's*) trial. See *Pritchard v. Loyd*, 2 Ind. 154, and *Thompson v. Grimes*, 5 Ind. 885. If, however, the hearers did not so understand *Mr. Carmichael*, but, on the contrary, understood him to make the renewed charge, independent of the facts developed on the trial, and upon what he might assume to know beyond the facts developed, then the words might constitute a slanderous charge.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded.

Newcomb & Tarkington, for the appellant.¹

Wm. P. Fishback, J. D. Howland, and Lucien Barbour, for the appellee.²

(1) The appellant, by counsel, argues: Where words, in themselves actionable, are spoken of a subject-matter which, in itself, is not a crime, or where there are circumstances given by the speaker, or known to the hearers, which show that no crime had been in fact committed, no action can be maintained for the speaking of the words. *Abrams v. Smith*, 8 Blackf. 95; *Van Rensselaer v. Dole*, 1 Johns. Cas. 239; *Thompson v. Bernard*, 1 Campb. R. 48; *Dexter v. Taber*, 12 John. R. 239.

(2) The learned argument of the counsel for the appellee consists mainly of a review of the facts, and an effort to reconcile them with admitted principles of law, favorable to the interests of the appellee.

Fidler v. Fidler.

FIDLER v. FIDLER.

PRACTICE IN SUPREME COURT.—Where there is evidence tending to sustain the finding and judgment below, this Court will not disturb the judgment where the case is brought here upon the evidence.

APPEAL from the *Floyd* Circuit Court.

HANNA, J.—It appears, in this case, that *John Fidler*, two months after the death of his wife, was married to *Rachel*, the plaintiff herein; that he had, for several years, been a sober and religious man; that, for several days preceding this marriage, he had been drinking, a part of the time drunk; that during that time, say for two weeks, immediately preceding the marriage, he was at plaintiff's house, who set liquor before him; that the plaintiff was requested by his friends not to marry him until he sobered up; that she would not consent, although the marriage was postponed from *Monday* until *Wednesday*, because he was drunk; that *Tuesday* night he was still drunk; that *Wednesday* morning, when married, he was in his shirt sleeves, looking dirty, &c.; that he was drinking for several days afterwards; that, when he became sober, he left her, and in little more than a month thereafter, she applied for a divorce. The Court granted it with 250 dollars alimony.

The pleadings and evidence appear to have presented the questions of the validity and fairness of the marriage contract. The Court, in passing upon the matters thus presented, must necessarily, in the conclusion arrived at, have determined those questions in the affirmative; at all events, the first. Whether we would have come to a like conclusion on the evidence, it is not necessary to say; but the Court, having so found, we do not see that we can, under our repeated rulings, disturb the judgment.

Per Curiam.—The judgment is affirmed, with costs.

John H. Stotsenburgh and *Thos. M. Brown*, for the appellant.
Willett Bullitt, for the appellee.

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156	40

PRACTICE—CHANGE OF VENUE.—It is too late to apply for a change of venue after the trial has been commenced.

For the other points decided herein, see the opinion at length.

APPEAL from the *Vigo* Circuit Court.

HANNA, J.—This was an action for the unlawful detention of “a certain coal bank, commonly called *Thrall's Coal Bed*, being about two acres of land, wherein the same is situated.” Suit was commenced before a justice. The transcript shows that the parties appeared, and, after the plaintiff had introduced a part of his evidence, to-wit: title deeds, the defendant filed an affidavit, that he believed the plaintiff was not the real owner of said land, but one *Mattingly*, or one *Thralls*, and moved to certify the case to the Circuit Court, which was overruled. He then filed an affidavit, alleging prejudice, &c., in the justice, and praying a change of venue, which was refused, on the ground that the application came too late. Judgment against the defendant.

On appeal, the defendant moved to dismiss, because the complaint contained no cause of action; because of the refusal of the justice to certify the cause, or to grant a change of venue. Motion overruled. Trial, finding and judgment for the plaintiff, over a motion for a new trial. The errors assigned are based upon the rulings in refusing to dismiss, and in overruling the motion for a new trial.

Upon the first point there was no error. The complaint sets out facts showing the right of the plaintiff to possession, and averring that the defendant entered peaceably into possession, but was holding by force and without right. There was no answer filed, and the affidavit filed did not put in issue the title to real estate. Under the statute, the application for a change of venue came too late—after the trial had commenced.

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Upon the second point, the amount of damages assessed for the detention, &c., was sixty-two dollars. The basis on which the damages were calculated, does not clearly appear. The record contains the evidence, and shows the amount of coal taken out, the value thereof at the mines before and after it was taken out, and the cost of transportation to market, and the value at that market. No evidence appears as to the use of any part of said two acres of land, or the improvements thereon, except the coal bed, nor that the same was of any value. It is evident, therefore, that the general ground upon which the damages were assessed, was the detention and use of the coal bed, and not the two acres of land; but it does not appear whether, in estimating the damages, the value of the coal in the mines, or at the market, after deducting the expenses, was taken into consideration. It is urged that the former is the measure of damages, and not the latter. The latter could not have been strictly adhered to in the assessment, as the evidence shows it would have given a sum much greater than that for which judgment was rendered. We are not prepared to say, from the record, that the judgment was for too great a sum.

It is also objected, that the judgment is erroneous, because it is for the recovery of the possession of the two acres of ground as well as the coal bed. The evidence shows that *Mattingly* leased, for one year, his farm, with the right to dig coal—this bed being thereon—to this defendant, in *February*, 1862, and that in *March*, 1862, said defendant released the right to dig coal, under said lease to said *Mattingly*, who, in *September* following, transferred two acres of land, including said coal bed, to *Kelley*.

It is possible that, if the trial had been had during the possession of said defendant, under his lease, the judgment, as to parts of said two acres of land, might have been erroneous. But however this may be, there does not, in this respect, ap-

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pear to have been any error that should reverse the judgment, for two reasons: First, there was no motion below to correct the judgment, or be relieved therefrom in any form. Secondly, the evidence shows, as before stated, that the occupation of the two acres of land, other than the coal bed, could not have entered into the assessment of damages; and as to the judgment for the possession thereof, at the time of trial, the defendant's time had expired, and he was no longer in possession.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

Thomas J. Forrest, for the appellant.

Scott & Pierce and *John E. Risley*, for the appellee.

RICHARDS, &c. v. STOGSDELL et al.

PAYMENT OF TAXES.—The payment of taxes in an illegal and void currency is a nullity, and the tax collector might, notwithstanding such payment, proceed to collect them as in other cases.

SAME—ACTION.—But the tax collector does not, by reason of a void payment to him of taxes on his duplicate, acquire any personal right of action against the person making such payment, for the recovery of the amount of taxes so attempted to be paid.

SAME.—A tax collector, in order to avail himself of the remedy given him by section 193, 1 R. S. 1852, p. 145, must proceed within the time limited in said section.

APPEAL from the *Owen* Circuit Court.

WORDEN, J.—In 1857 and 1858 *George Dittmore* was treasurer of *Owen* county. Certain taxes were due from the

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defendant, *Stogsdell*. These taxes, together with some taxes against other persons, *Stogsdell* paid to *Dittemore*, as such treasurer, in paper of the *Citizens Bank of Gosport*, an illegal and void currency. The taxes paid by *Stogsdell* for other persons were paid by virtue of an arrangement between him and them, for which he afterwards received from them good money. At the annual settlement by the treasurer, in *June*, 1858, the sums thus received from *Stogsdell* were charged against said treasurer. *Dittemore* claims that *Stogsdell* is indebted to him in the amount of the taxes thus paid by the latter in the currency mentioned, and assigned the account thereof to the plaintiff, who brought this suit to recover the same. On the facts above stated, the Court found for the defendant, and this finding seems to us to have been correct. It may be admitted that the payment of the taxes in the currency mentioned was void and of no effect whatever, and that the treasurer might, notwithstanding such payment, have proceeded to collect them as in other cases. Still it is not perceived that, independently of any statute, *Dittemore* acquired any personal right of action against *Stogsdell*. It seems to us that the payment was a nullity; that the taxes yet remained due, and that no implied assumpsit arose from the transaction against *Stogsdell* in favor of *Dittemore* personally. But there is a statute which enacts that, "if any county treasurer, on making settlement with the county auditor, shall stand charged with any tax remaining unpaid, and shall not receive a credit therefor in such settlement, such treasurer may collect such tax for his own use at any time within one year after such settlement, either by distress and sale, as hereinbefore provided, or by action of debt in his own name, before any justice of the peace, or court having jurisdiction." 1 R. S. 1852, p. 145, sec. 193. The suit in this case, however, was not brought within the time limited, and must therefore fail. It may be observed that there was an agree-

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ment that all matters of defense might be relied upon without pleading.

Per Curiam.—The judgment is affirmed, with costs.

Wm. M. Franklin, for the appellant.

John H. Martin, for the appellees.

HORNADAY v. CAMPBELL.

PLEADING—PRACTICE.—The decision herein relates to the sufficiency of certain pleadings, and can not be briefly stated.

APPEAL from the *Hendricks* Common Pleas.

WORDEN, J.—This was an action by *Campbell* against *Hornaday* to recover compensation for services performed by the plaintiff for the defendant as an attorney at law. Issue, trial, verdict and judgment for the plaintiff.

There were two paragraphs in the complaint. On the second no question arises and it need not be noticed. The first alleges in substance that there was an action pending in the Circuit Court of said county, by the State upon the relation of *Kennedy*, against the *Danville and White Lick Plank Road Company*; that the defendant agreed with the plaintiff, who was an attorney at law, that if he, the plaintiff, would assist said *Kennedy* in the prosecution of said action, the defendant would pay him or secure him the payment of a reasonable fee, therefore, &c.; that the plaintiff, in pursuance of the contract, did assist in the prosecution of said cause, and that he attended and engaged in the trial thereof; that before the final determination of said cause the plank road company discontinued their toll gate, and have, from that

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time to the present, discontinued the collection of toll on the road, and that *Hornaday* abandoned the prosecution of the said action, the object thereof having been accomplished, and that the defendant has not paid, &c.

The defendant moved to strike out a certain part of the complaint, which motion was overruled, and exception taken. In looking through the part of the complaint which the defendant desired stricken out, we find that it includes the averment of performance on the part of the plaintiff. Had the motion prevailed there would not have been enough left to sustain the action. The motion was properly overruled.

The defendant then demurred, but the demurrer was overruled, and correctly. The paragraph is clearly sufficient. On the trial the defendant objected to certain evidence on the ground of irrelevancy. Some of the evidence thus objected to might, perhaps, have been properly excluded, but if so we do not see how its admission has prejudiced the defendant.

The evidence justifies the verdict. There was some conflict in some respects, but take it all together the motion for a new trial was properly overruled.

Per Curiam.—The judgment below is affirmed, with costs and 5 per cent. damages.

C. C. Nave, for the appellant.

L. M. Campbell and *P. S. Kennedy*, for the appellee.

SNYDER et al. v. THE STATE ex rel., &c.

ACTION AGAINST COUNTY TREASURER.—An action against an ex-treasurer of a county and his sureties, on his official bond, should be prosecuted in the name of the State, on the relation of the auditor

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of the county, and not on the relation of the acting treasurer, and, if such action be instituted on the relation of the latter officer, it will be irregular, and can not be deemed to be amended in this Court.

APPEAL from the *Bartholomew* Circuit Court.

WORDEN, J.—This was an action by the State upon the relation of *Curtin*, treasurer of the county, against *Snyder* and his sureties, upon his official bond as former treasurer. Judgment for the plaintiff for 50 dollars.

We are met at the threshold of the case with the objection, that an action will not lie in such case upon the relation of the treasurer, and this objection seems to be well taken. Whatever may have been the provisions of former statutes on the subject, no statute now in force has been cited, and we are aware of none, which authorizes the treasurer to be the relator in such cases. By section 128, 1 G. & H. p. 102, it is provided that the county auditor, on being instructed to that effect by the Auditor of State, or the Board of County Commissioners, shall cause suit to be instituted against the treasurer and his sureties in certain cases. By section 132, it is provided, that, in suits against the treasurer and his sureties, the auditor shall be a competent witness. This provision would have been entirely superfluous, had it not been contemplated that the auditor should be a party to the suit as relator. The general system of checks and balances contemplated by the revenue laws, and intended to enable the auditor to properly charge the treasurer with what funds he receives, also strongly favors the construction, that suits upon an ex-treasurer's bond should be brought upon the relation of the auditor, and not of the incoming treasurer. But it is claimed, that if the action was wrongly brought in this respect, it could have been amended below, and will be deemed amended here. But, in our opinion, such a radical amendment as a total change of one of the parties to the action, or,

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which is in substance the same thing, a total change of the person suing as relator can not be deemed to be made here.

Per Curiam.—The judgment below is reversed, with costs.

Francis T. Hord and *N. T. Hauser*, for the appellants.

Stansifer & Herod, for the appellee.

JACKSON *v.* THE STATE.

CRIMINAL LAW AND PRACTICE.—A criminal prosecution upon indictment will be held erroneous where the record fails to show that the indictment was duly returned by the grand jury in open Court.

APPEAL from the *Grant* Circuit Court.

Per Curiam.—This was a prosecution under the statute prohibiting the sale, without license, of intoxicating liquors, by a less quantity than a quart. The indictment appears to have been filed in the clerk's office of said Court on the 15th of *February*, 1862, but it is not shown to have been "returned by the grand jury into open Court." It is true the transcript before us contains a statement to the effect that the Court, at the next term after the indictment was filed, directed an entry to be made of its return, but no such entry was made. And as the record fails to show such return by the grand jury, the proceedings must be held erroneous.

The judgment is reversed.

H. D. Thompson, *N. W. Gordon* and *W. R. Pierce*, for the appellant.

Oscar B. Hord, Attorney General, for the State.

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91	80
141	678

EXECUTORS AND ADMINISTRATORS—SALES OF REAL ESTATE BY.—*A*, on *August* 13, 1850, caused the real estate owned by *B*, at his death, to be inventoried and appraised by competent persons, selected by him, who were first sworn as required by law. *A* was, on the next day, duly appointed guardian of the heir at law of *B*, deceased, and gave bond and took the oath of office; and, on the latter day, filed his petition in the Probate Court, alleging the death of *B*, leaving a widow, and the heir at law aforesaid, and that after the death of *B* he married the widow, who has since died, intestate, and that no administration was ever granted on *B*'s estate, and that said estate is indebted to him in a large sum, and that he also expended a large sum in the support and education of his said ward, and that *B* left no personal property, but did leave the real estate inventoried and appraised as aforesaid, which it will be necessary to sell to pay the debts against his estate, &c., and for the maintenance and education of his said ward, and he filed the said inventory and appraisement with his petition. The prayer of the petition was that *A* be appointed administrator of said estate, and for an order to sell the real estate aforesaid at private sale, and that his ward be summoned, &c. The petition was verified. The Court thereupon appointed *A* administrator, and he duly qualified as such. It was then shown that his ward was a non-resident of the State, and it was then ordered by the Court that he be notified of the pendency of the petition by publication, which was done. At the next term of said Court the ward, failing to appear, was defaulted, and a guardian *ad litem* appointed for him, who answered. At the *February* term in 1851, before any further proceedings were had, *A* was removed by the Court, upon the application of another creditor, and his letters of administration were annulled. *C* was then appointed administrator *de bonis non* of the estate of *B*, and filed his additional bond as required prior to the sale of real estate, and then the Court, upon the original petition of *A*, ordered the real estate to be sold, at private sale, for the purposes therein indicated, and on terms prescribed by the Court. At the *August* term

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of said Court in 1851, said administrator *de bonis non* reported that he had sold said real estate to *A*, for more than its appraised value, on the terms prescribed, and *A*, waiving the credit, paid the purchase money, and the sale was duly reported to, and confirmed by, the Court, and a proper conveyance was executed and delivered to him therefor. The sale thus made was afterwards alleged to be invalid, amongst other reasons, because, when the petition for the sale was filed by *A*, he had not been appointed administrator, and the appraisers were selected by *A*, and the appraisement made before his appointment.

Held, that, under sections 27 and 28 (R. S. 1843, p. 455,) the sale so made was valid.

TRUSTEE—VENDORS AND PURCHASERS.—The purchase, by a trustee, of trust property, is not void, but may be avoided by the *cestui que trust*, within a reasonable time, by a direct proceeding for that purpose, but such avoidance can not be effected at the suit of a third person.

APPEAL from the *Elkhart* Circuit Court.

DAVISON, J.—This suit was instituted by *Rice, Sherman* and *Crews* against the appellees, to quiet the title to lands in *Laporte* county, and described as the “east half of the south-east quarter of section 17, and the north-west quarter of section 32, all in township 38, north of range 1 west,” and also to set aside an administrator’s sale, under which *Cleghorn* claims the lands. The facts alleged in the complaint are, in substance, as follows: The land in dispute belonged to *Luther Rice*, a *Pottawattomie* Indian, who migrated from *Laporte* county in the year 1835, and went to the then Indian country west of the State of *Missouri*, where he resided until his death, which occurred in 1843. At his death he left a widow, *Ann Rice*, who was also an Indian of the full blood, and the plaintiff, *William M. Rice*, the only child of *Luther* and *Ann Rice*, and his only heir. In 1843, a few months after the death of *Luther Rice*, *Cleghorn*, who is a white man, married

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the widow, who died in 1849 without issue by him. *Luther and Ann*, and their son *William M.*, are all of Indian blood, all resided in said Indian country, and *William M.* still resides there, and never has been, since the death of his father, a resident of *Indiana*. *Cleghorn*, it is alleged, in *August*, 1850, came to *Indiana* and fraudulently caused to be issued to himself, out of the Probate Court of said county, letters of administration on the estate of *Luther Rice*, and was also by said Court appointed guardian of *William M. Rice*, who was then a minor, and who did not arrive at full age until some time in the year 1853. On *November 16th*, 1850, *Cleghorn* petitioned for an interlocutory order against *William M. Rice*, to sell the above described real estate, and, afterwards, such proceedings were had in said Court that, at the *February* term in the year 1851, *Cleghorn* was removed and the defendant, *Likins* was appointed administrator *de bonis non*, who at the same term and at the instigation of *Cleghorn*, proceeded to and did procure the order of sale. After this, at the *May* term, 1851, the order, on motion of *Likins*, was modified so as to allow the sale to be private, and afterwards *Likins*, as such administrator, sold the same lands to *Cleghorn* at private sale, for 1,176 dollars. The sale was reported to the Court, was confirmed, and a commissioner was appointed who made a deed to the purchaser.

It is averred that no appraisement of the land was made, by either *Cleghorn* or *Likins*, while they, respectively, acted as administrator, and that *Likins* stated in his report of the sale that he had, on *August 4th*, 1851, sold the land for the best price it would bring, when, in truth, the sale was made at a price less, by 75 cents per acre, than had been, prior to the time the same was sold, offered by responsible persons; that the order of sale was founded on two claims, one in favor of *Cleghorn* for 658 dollars, and the other in favor of one *Vicory* for 72 dollars; that the former was false and

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fraudulent, and trumped up for the purpose, and the latter, if ever it was just, was barred by the statute of limitations; that *Cleghorn* was removed from his trust as administrator by his own fraudulent connivance, in order that he might be the better able to defraud *William Rice*; and that at the time of the sale, and previous thereto, *Likins* well knew that *Cleghorn* was professing to act as *William M. Rice's* guardian, and that they, *Cleghorn* and *Likins*, throughout the whole proceedings, combined and confederated to cheat him out of his land; that one of the 80 acre lots of the said north-west quarter sold for more than sufficient to pay all the claims against the estate, including the cost of administration, and yet, notwithstanding this, *Likins*, confederating with *Cleghorn*, fraudulently sold to him, he at the time professing to be the guardian of *William M. Rice*, the entire tract, 240 acres, for 1,176 dollars.

It is further averred that the deed of the commissioner to *Cleghorn*, though it was executed August 11th, 1850, was not recorded until the 15th of June, 1853. And that on the 4th of June, 1853, *William M. Rice*, he then being of full age, by deed in fee, conveyed the described land to the plaintiffs, *Sherman* and *Crews*, which deed was, on the last named day, duly acknowledged and recorded, and the same deed was again executed, acknowledged and recorded on the 22d of September, 1853; that the land, at the time *Rice* made and delivered the deed, was timbered land, wholly unimproved and unoccupied, but the right of possession thereof was vested in him, and he then took his grantees on the land and delivered to them peaceable possession in their own right, which vested in them the fee simple, and that at the commencement of this suit they still hold peaceable possession, &c.

And further, it is averred, that all the proceedings in the Probate Court were had without the knowledge of *William M. Rice*, before he was of full age, and whilst he lived in the

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Indian territory, and while *Cleghorn* himself was a resident of said territory; and that *Cleghorn* has no title to the land in question other than that which he claims to derive under the proceedings of said Court; wherefore, &c.

The defendants answers consist of nine paragraphs. The plaintiffs demurred to the fifth, sixth, seventh, eighth and ninth, but their demurrers were overruled, and replies having been filed, the issues were submitted to a jury, who found specially as to certain questions of fact propounded to them at the instance of the plaintiffs. And they also found a general verdict for the defendants. Motion for a new trial denied and judgment.

Among the various errors assigned are the following: "The Court erred in permitting the defendants to give illegal and irrelevant testimony to the jury," and "in giving irrelevant, erroneous and illegal instructions." The points involved in these assignments are not properly before us, for the reason that they do not appear to have been presented to the consideration of the Court in the motion for a new trial. There is, indeed, but one question to be considered in the decision of this case. Are the proceedings of the Probate Court relative to the sale and conveyance of the land, of sufficient validity to sustain *Cleghorn's* title?

A transcript of the record of these proceedings, filed with the answer, and given in evidence on the trial, stated thus:

On August 18th, 1850, the land was inventoried by *Joseph Likins* and *William Davis*, and by them appraised at 1,120 dollars. That is to say: the east half of the south-east quarter was appraised at 160 dollars, and the north-west quarter at 960 dollars. The appraisers were sworn in the form prescribed by the statute; but they do not appear to have been appointed by the Court, though their appraisal was filed in Court, and constitutes a part of the record of its proceedings. On the next day, August 14th, *William M. Rice*, by

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James Bradley, his attorney, appeared in Court and filed his petition, alleging that he is a minor over the age of 14, and has no guardian to take care of his person and estate, and praying that he may be permitted to make choice of some suitable person as his guardian. And thereupon the Court appointed *William Cleghorn* as such guardian who appeared and accepted the appointment, gave bond in the penalty of 100 dollars, with *Joseph Likins* as his surety, which was accepted by the Court, and he took the oath prescribed by law.

On the same day, *August 14th*, *Cleghorn* filed his petition, wherein he alleges, *inter alia*, that *Luther Rice* died in the year 1848, in the Indian country west of the State of *Missouri*, and leaving his wife, *Ann Rice*, and *William M. Rice*, his only child, now 18 years old, who also resides in said Indian country, and for whom he, *Cleghorn*, is guardian; and that after the death of *Luther Rice* he married the widow, who has since died; that no letters of administration have ever been granted on *Luther's* estate, and that that estate is indebted to him, the petitioner, by promissory note and otherwise, 370 dollars, and in addition he has expended large sums of money in the maintenance and education of the said *William M.*, and has not available means in his hands out of which to reimburse the same; that *Luther*, when he died, left no personal property, but was at that time seized in fee of certain land (the same as above described) in *Laporte* county, which it will be necessary to sell for the payment of the debts against the estate, &c., and for the maintenance, &c., of *William M.*; and that he has caused the same land to be appraised and files herewith an inventory and appraisement thereof. The prayer was that letters of administration be granted to the petitioner; that the Court will order the land to be sold at private sale for the purposes aforesaid, and that *William M. Rice* be summoned, &c. The petition was verified by affidavit, &c. The Court thereupon appointed *Cleghorn* admin-

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istrator of said estate, and having executed bond as administrator, in the penalty of 100 dollars, with *William Davis* as his surety, he took the usual oath, &c. It was then proved by affidavit that *William M. Rice* was not a resident of the State, and the Court ordered that he be notified, &c., by publication. Afterwards, at the *November* term, 1850, the notice so ordered was proved to have been duly published, and the said *William M.* having been called was defaulted, and one *Samuel E. Williams* was, by the Court, appointed his guardian *ad litem*, who for and on behalf of the minor filed an answer to the petition in the usual form. At the *February* term, 1851, and before any further proceedings on said petition, the Court, on the petition of one *John Vicory*, a creditor of the estate, removed *Cleghorn* by annulling his letters of administration, for the reason that he had failed to give bond as required by law, for the faithful discharge of his duties in the sale of the land, &c. And *Joseph Likins* was, at the same term, appointed administrator *de bonis non*, gave bond in the penalty of 100 dollars, with *Henry Brown* as his surety, and was duly sworn, &c. Afterwards, at the term last aforesaid, *Likins*, as administrator, appeared and filed an additional bond, with the same surety, in the penal sum of 2,240 dollars, and thereupon the Court, upon the petition so filed as aforesaid, and upon proof, &c., ordered the land to be sold for the purposes indicated in the petition, and that the administrator proceed to make sale thereof, at a price not less than two-thirds its appraised value, one-third of the purchase money to be paid in hand, one-third in nine, and one-third in eighteen months, the purchaser giving his notes with approved security, and that he give such purchaser a certificate of purchase, &c. This order was afterwards, at the *May* term, 1851, on petition of the administrator, so modified by order of the Court as to allow him to sell the premises at private sale. And afterwards, at the *August* term, 1851, the

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administrator reported, *inter alia*, that he had sold the land to *William Cleghorn*, at private sale, for 1,176 dollars; that is to say: the east half of the north-east quarter for 160 dollars, and the north-west quarter for 1,016 dollars, on the terms specified in the order; but *Cleghorn*, the purchaser, has paid and accounted to him, the administrator, for all the purchase money, &c. The report thus made was confirmed by the Court, and *James Bradley, Esq.*, was appointed a commissioner to execute a deed to the purchaser pursuant to the sale, which deed was accordingly made and delivered.

In these proceedings there are two irregularities, which we propose to consider: 1. The application for letters of administration and the petition for the sale of the land were filed together; in other words, when the petition for the sale was filed, *Cleghorn* had not been appointed administrator. 2. The appraisers were selected by *Cleghorn* and the appraisal was made before his appointment. These irregularities very plainly appear on the face of the transcript, and the inquiry at once arises, whether they render the order of sale inoperative and void?

An act of 1848, in force when the proceedings set out in the transcript were had, provides that, "in case any action shall be brought for the recovery of any real estate, sold by an administrator under the direction of the Court, or if any other action be brought by which the validity of the sale shall be contested, such action shall not be maintained, nor such sale avoided, on account of any irregularity or defect in the proceedings, if it shall be made to appear: 1. That the sale was directed by a Court of competent jurisdiction. 2. That the administrator took the oath and gave bond as required by law. 3. That notice of the time and place of sale was given in the manner prescribed by law. 4. That the premises were sold accordingly, and are held by one, or under one, who purchased them in good faith." Rev. Stat. 1848, p. 458, §§

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27 and 28. Are the proceedings to which we have referred within the requirements of this enactment? The Probate Court, it must be conceded, had jurisdiction of the case. *Id.* 501, 502, 503. And the transcript of the record affirmatively shows that the defendant, in the proceeding, was notified in the mode prescribed by the statute. *Id.* 523, sec. 224, and a guardian *ad litem* was duly appointed. *Id.* sec. 226. But if the record was silent on the subject of notice, jurisdiction of the person would be presumed. 1 Ind. 130. The administrator who sold the land took the oath required by law, and was in other respects qualified to proceed to the discharge of the duties of the trust. And "previous to the making of the order of sale" he executed a bond as the statute requires, with surety to the approval of the Court, and in a penalty "not less than double the appraised value of the land." *Id.* p. 529, sec. 234. But it is said that as the appraisement was made prior to the appointment of any administrator it was a nullity, and could not, therefore, be allowed to constitute a basis upon which to measure the penalty of the bond. This conclusion is not, it seems to us, strictly correct. The appraisers appear to have been duly sworn, and though they were selected by *Cleghorn* before he became administrator, still the appraisement was merely irregular.

The competency of the appraisers, or that their inventory contained a true estimate of the value of the land, does not seem to have been successfully contested. Having been placed on file, and recognized by the Court, it was, as an appraisement, within the substantial requirements of the statute; and the result is, the bond given immediately "previous to the making of the order of sale" was effective and binding on the parties, and must be deemed "as required by law." It is true, notice of the time and place of sale was not given, nor was such notice at all necessary, because the petition asked, and the Court, in the exercise of its discretionary power, or-

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dered, the land to be sold "at private sale." *Id.* 529, sec. 238. The administrator, in making a private sale, is not required to fix "the time and place of sale," and it seems to follow, that the notice, directed by the statute, relates to sales to be made "at public auction." *Id.* Where, then, the order is to sell at private sale, and the property has been accordingly sold, notice of time and place is not essential to the validity of the sale. And whether the land was purchased by *Cleghorn*, in good faith, was a pure question of fact, which has been answered by the jury in their verdict for the defendants. And, in addition, the jury found specially, that the purposes of *Cleghorn*, relative to the proceedings in the Probate Court, and the purchase of the property, were not fraudulent.

The appellants assume another ground, which we will notice. They say that *Cleghorn*, when he purchased the land, was the acting guardian of *William M. Rice*, the only heir of *Luther Rice*, deceased; and hence the sale was void. This position is not strictly correct. The purchase by a trustee of trust property is not void, but may be avoided by the *cestui que trust*, within a reasonable time, in a direct proceeding for the purpose; but such avoidance can not be effected at the suit of a third person. *Shaw v. Swift*, 1 Ind. 565; *Doe v. Harvey*, 3 *id.* 100; *Hawkins v. Regan*, 20 Ind. 193; *Jackson v. Vandalfson*, 5 Johns. 43. Here, *Sherman* and *Crews* being, as contemplated by the will, third persons, can not be allowed to avoid the sale of the administrator, on the ground that *Cleghorn*, when he purchased, was guardian. And *William M. Rice*, by his conveyance of the land, before the institution of this suit, invested them with, and divested himself of, all his title to, and interest in, the premises, so that they are the real parties in interest. And, moreover, the evidence shows, that, after he became of full age, he made a settlement with his guardian, and received of him 500 dollars and 16 cents, the residue of the sum for which the land was purchased, after

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payment of the claims, to be paid out of the purchase-money. This, it seems to us, was, in effect, a confirmation of the sale. We are of opinion that the sale to *Cleghorn* was valid, and that the verdict is right upon the evidence. It follows the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.
J. A. Liston, for the appellants.

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 155 597

THE BANK OF THE STATE v. WHEELER.

BANKS—CASHIER—POWER OF.—The cashier of a bank is generally, by virtue of his office, entrusted with the notes, securities, and other funds of the bank, and is held out to the world, by the bank, as its general agent in the negotiation, management and disposal of them, and, *prima facie*, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use; and the purchaser thereof, in good faith, from the cashier, without notice of any special limitation of his power to transfer and indorse such paper, will acquire perfect title thereto, and the indorsement thereof, as cashier, will bind the bank.

SPECIAL FINDING—PRACTICE.—Where a judgment is rendered on a special finding of facts, and there is any evidence tending to establish the existence of the facts necessary to uphold the judgment in point of law, and there is nothing indicating any other error, mistake, or wrong, except mere error of opinion on evidence, the Supreme Court will not disturb the finding.

APPEAL from the *Porter* Circuit Court.

PERKINS, J.—*Amzi L. Wheeler* sued the *Bank of the State*, as indorser of a bill of exchange. The bank defended on the ground that the indorsement was made by the cashier, as was or might have been known to the plaintiff, for the ac-

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commodation of other parties, without authority from the bank, &c. The cause was tried by the Court, who made a special finding as follows:

"The Court finds, that on the 15th day of *January*, 1861, *Luther J. Abbott* and *Ephraim A. Abbott* drew the bill of exchange, which is the foundation of this action, on *Nicholas Abbott*, and thereby requested said *Nicholas* to pay, sixty days after date, to the order of *M. Lair Harter*, at the *Park Bank*, in the city of *New York*, and State of *New York*, five thousand dollars; that said *Nicholas*, on the same day, accepted the same in writing on the bill; that said *M. Lair Harter*, on the same day, indorsed said bill in blank, and delivered it to said *Nicholas Abbott*; that the bill was dated *January 15th*, 1861.

"The Court further finds, that *H. Early* was, for a long time before and after, and at the date of said bill, the cashier of the *Plymouth Branch of the Bank of the State of Indiana*, and was, also, as was said *Nicholas Abbott*, a director in said bank; that said *Early*, as such cashier, on said 15th day of *January*, 1861, discounted said bill of exchange for, and purchased the same of, said *Abbott*, and paid him for it with the money of the bank, the purchase being made for the bank; that afterwards, on the same day, said *Early*, as such cashier, and for and on behalf of the bank, sold and indorsed said bill to the plaintiff, *Wheeler*, who then and there paid the bank the purchase-money therefor. The indorsement was to '*H. Early*, cashier,' and by '*H. Early*, cashier.'

"The Court further finds, that said bill was not discounted by the directors of said branch bank; that the said *Early* and *Nicholas Abbott* knew, when they discounted said bill, that it was against the instructions of the directors; and that, to conceal the transaction, said *Early* made false entries on the books of the bank; but the Court finds, that the plaintiff, *Wheeler*, purchased said bill, and paid for it in good faith,

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and without notice that it had not been purchased by the bank, and that it had not authorized its indorsement to him; and that he had previously agreed with the cashier, *Early*, that if the bank discounted the bill, he would re-discount it, if the bank should need the money." See, as to the effect of this finding, *Bolton v. Howell*, 18 Ind. 181. The Court found that all the steps to charge indorsers had been duly taken.

The Court found, as a conclusion of law, upon the facts set forth, that the bank was liable to the plaintiff for the amount of the bill, costs of protest, &c., and rendered judgment accordingly. A motion for a new trial was overruled.

The *Bank of the State*, by charter, has power to deal in bills of exchange, &c., to appoint a cashier, and require him to give a bond, &c. See the charter.

In *Wild v. Bank of Passamoquoddy*, 3 Mason, 505, a case much like the present, Judge *Story* said: "The cashier of a bank is, *virtute officii*, generally entrusted with the notes, securities, and other funds of the bank, and is held out to the world, by the bank, as its general agent in the negotiation, management and disposal of them. *Prima facie*, therefore, he must be deemed to have authority to transfer and indorse negotiable securities, held by the bank, for its use and behalf."

In that case, the plaintiff recovered against the bank, upon an indorsement of the cashier. The case has since been followed as authority. *Dunlap's Pal. Ag.* p. 156; *Story on Ag.* sec. 114; *Ang. and Am. on Corp.* sec. 300; *Bank of Genesee v. Patchin Bank*, 19 N. Y. Rep. 312. See, also, 17 Ind. pp. 550, 559.

And in *Story on Promissory Notes, &c.*, 127, it is laid down, that an indorsement of a note to the cashier of a bank, will be deemed an indorsement to the bank, the indorsement being in this form, "to *A B*, cashier."

In the case at bar, the transactions were the purchase and sale of a bill of exchange. It does not appear, in the case, that the

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cashier of the bank, who received and transferred the bill in question, possessed less than the ordinary power of bank cashiers. It follows that the bank was liable upon the indorsement made by the cashier, and that the judgment for the plaintiff was right, if the purchase by *Wheeler* was *bona fide*. It would certainly greatly embarrass monetary and mercantile transactions, if every man, who bought and sold gold and silver and commercial paper, at the counter of the bank, of or to the cashier, was compelled to call for the records of the bank, to see that the cashier had the powers he assumed, they being within the general scope of the authority of such officer. The directors of banks are not usually in perpetual session, while the business of banks is occurring every day, and must, of necessity, be transacted by the officers in charge, or not at all. The public interest requires that the banks should be bound by the acts of their officers in their ordinary business. See *Smith v. Stevenson*, 18 Ind. 327. The remaining question, then, is, does the evidence, which is of record, tend to sustain the finding of the Court below, that *Wheeler* was *bona fide* purchaser? See *Bolten v. Howell*, *supra*.

From the evidence, the Court might find, without any strained construction of it, that *L. J. and E. A. Abbott*, of *Troy, Ohio*, wanted money; that their father, *Nicholas Abbott*, who resided with them in *Ohio*, and who was a director in the *Branch of the Bank of the State of Indiana*, at *Plymouth, Indiana*, and a member of the discount committee, undertook to procure the money for his sons; that he had applied to *Amzi L. Wheeler*, a private banker at *Plymouth*, to discount a note for his sons; that *Wheeler* had promised to do so, if the note had certain names on it; that *Nicholas* brought to *Wheeler* a note for discount, but, it not having on it the specified names, *Wheeler* refused to do the note; that *Nicholas* then applied to the branch bank to discount the note; that

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the branch was desirous to do it, and had money enough on hand for the purpose, but did not like to spare it for fear calls might be made that it ought to, but could not meet if it did; that *Wheeler* informed the officers of the bank, or some of them, that, if the bank discounted the note, he would re-discount it for the bank, if it needed the money; that the cashier of the bank, who was in the habit of discounting paper, on his own judgment, as was known to the officers of the bank, then discounted or purchased the note in suit, the teller of the bank paying for it with money of the bank, taken at the time from its vault, in the usual course of business; that *Wheeler*, directly after, purchased the note of the bank; that the bank charged *Nicholas* 127 dollars discount, and *Wheeler* charged the bank 105 dollars; that *Wheeler* acted in perfect good faith, and in ignorance of any restriction having been placed upon the power of the cashier in reference to the matter; indeed, it does not appear by the evidence that any restriction had been so placed, but only that there was "an understanding" in the bank, that discounts were to be discontinued; and, further, that the cashier expected, in his own mind, that he should be censured, in the given case, for the discount, and had false entries made, &c., of which *Wheeler* knew nothing.

The case, in one view of the evidence, is this: A person comes to town to sell, or to get discounted, a note. There are two banks in town—one has plenty of money to spare, with which to buy the note, but refuses to do so because it is not certain as to the goodness of the paper; the other is hardly able to spare the money for the purchase of the note, but is satisfied of the goodness of the paper, and is desirous to purchase it, and willing to do it if it can ascertain where it can sell the paper, and raise money, if finding itself in need. It learns that bank No. 1, in the town, will buy the paper if it is offered to it by bank No. 2, with its indorsement

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on the paper. Bank No. 2 accordingly buys the paper, and afterwards sells it to bank No. 1. We see nothing in this but a legitimate transaction. The evidence tends strongly to support the finding of the Court below. It may be observed that the testimony of *Wheeler* reads more like truthful evidence than does that of *Early* or *Abbott*.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

McDonald, Roache & Lewis, and John B. Niles and John B. Howe, for the appellant.¹

James Bradley and D. J. Woodward, for the appellee.²

(1) There is no brief for the appellant with the record.

(2) The counsel for the appellee argue: A judgment upon a verdict, or special finding of facts, will not be disturbed when there is any evidence tending to sustain it. 2 Blackf. 137; *id.* 167; *id.* 464; 4 *id.* 311; 5 *id.* 108; 7 *id.* 540; *id.* 290; 8 *id.* 339; 18 Ind. 418; *id.* 420; 18 Ind. 181; *id.* 272.

In the absence of proof to the contrary, the cashier has authority to bind the bank by the indorsement and transfer of the securities of the bank. *Badger v. Bank of Cumberland*, 26 Maine, 428; *Burnham v. Webster*, 19 Maine, 232; *Fleclener v. Bank of the Passamaquoddy*, 3 Mason, 505; *Folgey v. Chase*, 18 Pick. 63; *Minor v. Mechanics' Bank of Alexandria*, 1 Peter's R. 46; *Frankfort Bank v. Johnson*, 24 Maine, 490; Story on Ag. § 114; Angell and Ames on Corp. § 299, *et seq.*; *Bank of Genesee v. Patchin Bank*, 19 N. Y. R. 312; *Jones v. Hawkins*, 17 Ind. 550; *Smith v. The Branch of the State*, 18 Ind. 327.

GLIDEWELL v. DAGGY.

NEW TRIAL—PRACTICE.—Under the code, a new trial after the term can only be granted for a cause for which a new trial might have been granted during the term, had the cause then been known,

21	95
125	374
21	95
129	978
21	95
130	529

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and the same facts must be made to appear before the Court, to determine the exercise of its discretion in the one case as in the other.

SAME.—Where an application for a new trial is made after the term, based upon newly discovered evidence, there must be brought to the knowledge of the Court, by affidavits or otherwise, the issues in the cause, the evidence adduced upon the former trial, and the newly discovered evidence, in order that the Court may correctly determine its duty in the premises.

SAME.—The application for a new trial must be made by a complaint, which should show, on its face, a cause for a new trial, to the end that, if it should be demurred to, and thereby admitted, the Court could finally act upon it.

APPEAL from the *Putnam* Common Pleas.

PERKINS, J.—The plaintiff calls his suit, by name, one for a review and rehearing. And in the complaint he filed, he evidently shows that he was confounding, in his mind, the two remedies of a suit for a review, and a suit for a new trial, when he filed it. But the only part of a case he makes falls within the provision of the statute, authorizing the granting of trials after the expiration of the term. We shall treat the case as one, for the obtaining of such new trial, under sec. 356, p. 215, 2 G. & H.

New trials may be granted for any legal cause during the term at which the original trial is had, where such cause is known at that term; and, if the cause is not known at that term, but is discovered afterwards, within a year from the rendition of final judgment, application may be made for a new trial within a year after the rendition of such judgment, upon which application a new trial may be granted, if sufficient cause is made to appear. But the cause for which a new trial may be granted after the term, must be a cause for which a new trial might have been granted during the term, had the cause been then known; and the same facts must be

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made to appear before the Court, to determine the exercise of its discretion in the one case as in the other. One of the causes for a new trial during the term, is newly discovered evidence. It may, therefore, be a cause for granting a new trial after the term.

If the new trial is applied for during the term, the Court has before it the issues in the cause, and, in memory, the evidence that was adduced upon the trial had, and must have before it, by affidavit or otherwise, that which has been newly discovered, that it may be able to judge whether the new evidence is merely cumulative or not, and of its probable effect, in connection with the old evidence, upon the result of the case, and thereby be able to judge of the propriety of granting a new trial. There are other matters, also, that must appear, but the issues in the cause, the old and the new evidence, surely should be three matters appearing.

The manner in which the application for a new trial must be made after the term, is pointed out by the section above quoted. It is by complaint, and the complaint must show, on its face, a case for a new trial, so that, should it be demurred to, and thereby be admitted, the Court would act finally upon it. It must contain, in allegation, what must be shown in proof. *Cox v. Hutchings*, at this term.

In the case before us, the complaint shows that *Addison Daggy*, assignee of the firm of *Jacob Daggy & Co.*, sued the plaintiff herein, *Glidewell*, on a promissory note, and recovered judgment. The issues in the case are not stated. But *Glidewell* seeks a new trial within a year after the rendition of judgment against him; and he avers that he had long ago paid the note, by delivering to the firm of *Daggy & Co.* a yoke of oxen, before it was assigned to *Addison Daggy*, who sued on it. He says that *Addison Daggy* obtained judgment against him on the note, "by *Jacob Daggy* testifying that he paid said *Glidewell* for the oxen at the time of their delivery," when

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such was not the fact. He does not explain whether he means that *Jacob Daggy's* testimony was all the evidence given in the cause, or that it had, in his opinion, a controlling influence in the case. As the Court below heard the testimony, we presume, on the trial when it occurred, it was enabled to value the ambiguity in accordance with the actual fact. He adds, in his own complaint, that the reason why he did not disprove the truth of *Daggy's* testimony on the former trial, was, that "he did not then know of the testimony that would set aside the testimony of *Jacob Daggy*." Why he did not know of it, he does not explain, nor does he intimate that he made any diligence in attempting to discover it, while it appears in another part of his complaint, that he knew all the members of the firm of *Daggy & Co.*, to whom he paid the oxen, viz: *Jacob Daggy*, and one *Landis*, and one *Grooms*. He then closes his complaint by alleging that he will be able to disprove his testimony on another trial, "by *Isaac Proctor*, *Richard Grooms*, and *Thomas Glidewell*." Here the complaint closes. The complaint is verified alone by the oath of *Robert Glidewell*, the plaintiff.

We can not say that the Court erred in holding the complaint bad.

Per Curiam.—The judgment is affirmed, with costs.

C. C. Nave, for the appellant.

Addison Daggy, for the appellee.

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131	80

 LEE v. HEFLEY.

PLEADING—PENDENCY OF ANOTHER ACTION.—Under the third subsection of section 50 of the Code, (2 G. & H. p. 79,) where the

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pendency of another action for the same cause between the same parties is pleaded in abatement, it is not necessary to recite the complaint in the former suit, or to aver that such action is still pending, because it is sufficient, to abate the second action, to show that the first action was pending at the time the second action was commenced.

PLEADING—SEDUCTION.—In an action by the female seduced against her seducer, to recover damages, it may be shown that the seduction was accomplished under a promise of marriage, and the facts and circumstances generally, which constituted the means of its accomplishment, may be alleged and proved.

SAME—INFANCY.—In such action, the answer by the defendant, that at the time of the commission of the act, &c., he was an infant, under the age of twenty-one years, &c., constitutes no bar to the action, and is demurrable.

APPEAL from the *Warren* Circuit Court.

HANNA, J.—*Hefley* sued *Lee*, alleging that he seduced, debauched and begot her with child, &c.; that to effect said seduction, &c., he promised to marry her, &c.

Answer, in abatement, that at the commencement of said suit there was a suit pending, &c. There was a demurrer sustained to this answer, which presents the first question. The ruling of the Court, it is argued, was right, on the ground that the answer should have averred that the suit was then pending at the time of pleading.

Our statute is as follows upon the subject of demurring when the complaint shows another action pending: "That there is another action pending between the same parties for the same cause." 2 R. S. p. 38, sec. 50, sub-division third. As the complaint did not show such prior action pending, we suppose it could be pleaded, and believe that in this case it was properly pleaded. An inference might be drawn from the language employed that it was the intention of the law makers to permit such a defence only in cases where the suit

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was pending at the time of pleading. But, it is by no means clear from the reading that such construction would be right, and as it would be in violation of the principles of pleading which formerly maintained, in that respect, we are not inclined to adopt such construction, believing that the language employed would have more directly expressed the purpose if the intention had existed to change the rule in that regard. It is said in *Saunders Pl. & Ev.*, 2d Am. ed., p. 20: "It does not seem essentially necessary to state the declaration in the former suit, nor to aver that such action is still pending, as it is sufficient to abate the second writ to show that it was pending at the time the second action was commenced." See, also, 1 *Chit. Pl.*, 9th Am. ed., p. 454, and note 6.

The defendant then pleaded that at the time of the commission of said act, &c., he was an infant, under the age of twenty-one years, &c. A demurrer was sustained to this answer. It is urged on the one hand that the promise to marry is the gist of the action; on the other that it is alleged only as inducement to the right of action, which, it is insisted, arose out of the wrongful act of seduction, &c., and was shown only as one of the means used to effect that act. By sec. 24, p. 33, 2 R. S. 1852, it is provided that, "Any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor."

We suppose facts and circumstances, other than a promise to marry, might be alleged and shown in connection with such a charge of seduction. Indeed it has been seriously questioned whether, in an action by the father for the seduction of his daughter, evidence was admissible to show that the defendant prevailed by a promise of marriage. 3 *Stark. Ev.* 1810, and authorities; but it is now settled in this country that such evidence is admissible. 2 *Greenl. Ev.* 579, and note.

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The statute above quoted says nothing about the seduction being procured or rather accomplished through a promise of marriage. Such a promise is, therefore, only one of the means which might be brought to bear to accomplish such a purpose. We are of opinion, therefore, that, in the form in which infancy was set up, it was not a bar to the action. We are not called upon to say what the effect of such an answer ought to have been if pleaded as to the question of damages, averring notice upon the part of the plaintiff. Nor is it necessary to intimate an opinion upon the case, put in argument, of a seduction procured solely upon the promise of marriage made by a known infant. This is not a case of that character, as shown by the record.

The next point presented is that the defendant was not permitted to prove by the plaintiff, on cross-examination, the respective or relative positions of the parties at the time of the alleged illicit intercourse.

It is true that it is not every improper connection that consummates a seduction; but it is also true that it is not necessary to make out such a case to show that the plaintiff was not willing to the act, for a performance of such an act against the will of the female would constitute an offence other than seduction. It is also true, then, that the act might have been performed with the consent of the plaintiff, and yet a case of seduction have been thus consummated; for the material inquiry rises, how was that consent procured? How were the minds of the two persons brought to the same conclusion? We can not perceive the force of the argument, then, that the jury might have inferred from the positions, if shown, that no seduction had taken place—especially in view of the evidence that the plaintiff had, in answer to a question of the defendant at the time of the act, as to whether there was danger, responded that there was “not if father’s book tells the truth,” and of the statement of the defendant that he

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told her that he thought there was "no danger, that he thought he understood himself." The purport or contents of the "book" do not appear in the record. Whatever positions may have been assumed may have resulted from foolish, not to say wicked, suggestions contained in said book, or from the self-sufficient wisdom of the defendant, in supposing that he "understood himself" upon a subject in which the result showed that he, and perhaps the book also, were at fault. Indeed it is said, 18th and 19th vers., 30th proverb, by the wise man, that "there be three things which are too wonderful for me, yea four, which I know not; the way of an eagle in the air; the way of a serpent upon a rock; the way of a ship in the midst of the sea; and the way of a man with a maid."

The last point made is upon the refusal to grant a new trial, on account of the verdict being unsupported by the evidence. Upon the point of the seduction there was no evidence but that of the plaintiff and defendant. We have examined it with care, and can not say but that it tended to support the verdict.

For the error in the ruling on the demurrer the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Samuel C. Willson, for the appellant.

Joseph H. Brown and *James Park*, for the appellee.

Ristine et al. v. Early et al.

RISTINE *et al.* v. EARLY *et al.*

STATUTES CONSTRUED—EXECUTION.—Section 527 of the code, (2 G. & H. p. 264,) must be so construed as to require that the time during which a party to a judgment may be restrained from proceeding to collect it, by agreement of the parties entered of record, shall be certain and fixed, and not uncertain or determinable by future events. Public policy requires that the public records should afford definite and certain information as to the incumbrances upon real estate.

APPEAL from the *Fountain* Circuit Court.

HANNA, J.—Suit to enjoin a sale of lands on execution. The complaint shows that title to the lands was derived through one *Piatt*, against whom, as surviving partner of the firm of *Piatt & Winans*, *Early* had recovered a judgment, on the 20th of *September*, 1841, upon which the said execution had issued on the 9th of *March*, 1860.

The answer admitted the facts thus stated, but set up that at the time the judgment was taken there was an entry of record, following said entry of judgment, in these words: "And it is agreed by the parties in open Court that there shall be a stay of execution on the above judgment until the estate of the said *Cornelius S. Winans* shall first be exhausted," and that at the same term, a judgment was taken on the same claim against the administrator of said estate of *Winans*; that said *Early* afterwards, to-wit, in 1860, recovered against said administrator and his sureties a judgment for assets of said estate, &c., and, by execution thereon, exhausted said estate; and that there still remained due on said first named judgment the amount for which said execution was issued. To this answer there was a demurrer overruled. A reply was then filed; that said *Early* had, for an unreasonable length of time, failed to press a settlement of said estate of *Winans*,

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or to proceed to exhaust the same. There was a demurrer sustained to said reply, and an injunction refused.

The rulings on the demurrers raise the questions for our consideration.

The answer is accompanied by a transcript of the judgment and proceedings in the case of *Early* against *Piatt*, in 1841; also, in the case against the administrator at the same term; also, of the case against him and his sureties, in 1860; also, the settlement sheet of the said administrator made in 1858. From all of which, so far as we can see, great and unreasonable delay occurred in the effort to collect said debt from the estate of said *Winans*.

For many years, judgments have been, by statutes of the State, declared to be liens upon the real estate of the judgment debtor. See Rev. Stat. 1831, p. 274-5; Rev. Stat. 1838, p. 316; Rev. Stat. 1843, p. 454; 2 Rev. Stat. 1852, p. 154. The statute of 1831 was continued in the revision of 1838, with its exceptions, which will be hereafter noticed. A part of those exceptions was dropped out of the revision of 1843, and reinserted in that of 1852.

The substance of all those acts is the same, namely, that a judgment is a lien for ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal or injunction, or by the death of the defendant, or by agreement of the parties entered of record. This latter exception is the one that was dropped out of the revision of 1843, but reinserted in that of 1852. But, it will be observed, it was in force at the time the judgment was taken—in 1841—and the agreement therein made.

The first question, then, for consideration is upon the ruling on the demurrer to the answer. That, in the absence of all fraud, a judgment is a lien at all, is the result of statutory enactment. We suppose the exceptions could have been left

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out of the statutes of 1831 and 1838, and the lien made positive for ten, or, as well, for twenty years. But an exception was inserted, that, it is insisted, embraced the arrangement entered into by the parties to the judgment taken in 1841, whilst said statute was in force. The question upon the demurrer to the answer is, whether such was the fact; that is, whether said agreement was one that should be recognized as binding under said statute, conceding it to be in force. We are of opinion that public, as well as private interests, require that all incumbrances upon real estate should be clear and definite, not only as to their terms, but as to time. This results from the fact, that real estate so often passes from one to another in this country, that purchasers should be enabled to determine, from an examination of the public records, where liens, &c., are required to appear, the fact of whether a lien exists, and the amount and duration thereof. By turning to the agreement in restraint of execution, in the case at bar, it will be seen that it is indefinite as to the time such restraint might continue to exist; it might be for a short period—two years say—as there were some portions of the statutes, in regard to the settlement of decedents' estates, that would indicate that such settlement should take place within about that period. Or it might be said that such settlement should be made within a reasonable time, considering the circumstances of each particular case. This would be about as indefinite as the agreement itself; or it might be insisted, as in this case, that the lien might continue for eighteen or twenty years. The exact language of the statute of 1838 is: "But any time of restraint upon the judgment creditor, by the order or decree of a Court of justice, or by agreement between the plaintiff and defendant, entered of record, prohibiting execution to be done upon such judgment, shall not be computed as a part of the time aforesaid." That is a part of the ten years.

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In view of the policy of the law, as affecting public and private interests, above adverted to, we are of opinion, a correct construction of this statute would require an agreement, to fall within its provisions, to be for a certain and fixed period of time; that is, that execution should be suspended for a period of time agreed upon definitely—as two, three or four years—but not depending upon uncertain events.

It would follow, from this conclusion, that the agreement, in this case, was not such an one as would have prevented the judgment creditor from taking out his execution at any time, and consequently did not affect the operation of the general law on the subject of leins and their duration. If this is correct, and we think it is, the lein of the judgment, upon which the execution issued, in the case at bar, had ceased to exist for a long time previous to the issue and levy of the said execution. As these facts all appear by the answer, the demurrer thereto should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Huff & Jones, for the appellants.

IRWIN *et al.* v. HELGENBERG *et al.*

PRINCIPAL AND SURETY.—NOTICE.—On *May* 3, 1861, *A*, as principal, and *B* and *C*, as sureties, executed a joint promissory note to *D*, who indorsed it to *E*, who, on *August* 22, 1861, recovered judgment on it by default against *B* and *C*, process having been returned not found as to *A*. On *December* 6, 1861, *B* and *C*, in writing, notified *E* to sue *A* on the note. *E* failed to do so, but sued out his execution against *B* and *C*, who thereupon filed their complaint to enjoin the collection of the judgment of them.

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Held, 1. That, the note being joint, and therefore merged in the judgment aforesaid, it is doubtful whether an action could be maintained thereon against *A*, after judgment had been taken against *B* and *C*.

2. But, that, at all events, *E*, having, before receiving the notice, sued all the makers of the note, and recovered judgment against all on whom he could get service of process, could not be required to bring another suit before he could avail himself of that judgment, unless some equitable ground is specially shown entitling them to such relief.

APPEAL from the *Hamilton* Common Pleas.

WORDEN, J.—On the 3d of *May*, 1861, one *Jeffers*, as principal, and the appellants, as sureties, executed a promissory note to *Howard*, who indorsed it to *Helgenberg*. On the 22d of *August*, 1861, *Helgenberg* recovered a judgment by default against the appellants upon the note, process in that behalf being returned not found as to *Jeffers*. On the 6th of *December*, 1861, the appellants notified *Helgenberg*, in writing, to sue *Jeffers*, the principal on the note. *Helgenberg*, not having done so, and pressing the appellants with an execution upon the judgment, the appellants filed this complaint to restrain him from the collection, alleging the above facts, and that *Jeffers* was a resident, &c., and solvent. A demurrer was sustained to the complaint, and final judgment rendered for the defendant.

The ruling below, we think, was correct.

Our statute, which seems to govern the case, provides, that “any person, bound as surety upon any contract in writing for the payment of money, or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee, forthwith, to institute an action upon the contract. If the creditor or obligee shall not proceed, within a reasonable time, to bring his action upon such contract, and prosecute the same to judgment and

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execution, the surety shall be discharged from all liability thereon." 2 G. & H. 306.

The note, which appears in the record, is a joint note, and it is by no means clear that *Helgenberg* could maintain any action upon it against *Jeffers*, having taken his judgment upon it against the appellants. Vide, on this point, *Nicklans v. Roach*, 8 Ind. 78, and *Archer v. Heiman*, at the present term. But, however this may be, it seems to be clear, that the case is not within the terms of the statute, nor is there any equitable ground shown for interfering with the collection of the judgment. *Helgenberg* had brought suit upon the note long before he was notified to sue *Jeffers*, and had recovered judgment against those upon whom he got service of process. He had already done all that could be required of him. He could not be required to bring another suit against *Jeffers*, before he could avail himself of the judgment he had already obtained. The statute does not contemplate a notice to be given to sue, in cases where judgment has been already obtained against the surety, and, in default of suit, to discharge the surety. The language is, if the creditor, &c., shall not proceed, &c., to "bring his action upon the contract," &c., "the surety shall be discharged from all liability thereon;" that is, from all liability on the contract. This language is not at all applicable to a case where there is already judgment against the surety, for the contract is then merged in the judgment. There is no particular hardship in requiring the appellants to pay the judgment against them; for, if they were the sureties of *Jeffers*, and if he be a resident and solvent, they have a plain and adequate remedy against him. There may be, and undoubtedly are, many cases in which a surety is entitled to relief, after judgment against him, but there must be some equitable ground therefor, which, as before remarked, does not appear in this case.

Per Curiam.—The judgment below is affirmed, with costs. *D. Moss*, for the appellants.

Watson's Administrator et al. v. The State ex rel., &c.

WATSON'S Administrator *et al.* v. THE STATE *ex rel.*, &c.

PRACTICE.—Where an action abates as to one of the defendants by his death, and his personal representative is substituted as a defendant, and appears to the action, no process against him is necessary.

APPEAL from the *Madison* Circuit Court.

WORDEN, J.—Action by the State on the relation of *Hardy*, and *Hardy* against *Watson* and his sureties on his official bond as sheriff of *Madison* county. Issue, trial by the Court, finding and judgment for the plaintiff.

The Court below overruled a demurrer to the complaint, to which ruling exception was taken. No objection to the complaint is here pointed out, and we discover none. The evidence is not in the record, the 30th rule not being complied with.

During the progress of the cause the death of *Watson* was suggested, and his administrator was made a party. It is objected that process was not served upon the administrator, and that he was not in Court, &c. If the administrator voluntarily appeared no process was necessary. That he did appear is stated by the record, which avers that the "parties" came, &c. What we have said disposes of all the questions arising upon the record.

Per Curiam.—The judgment below is affirmed with costs, to be levied of assets, &c.

Davis & *Sansberry*, for the appellants.

W. R. Pierce, *H. D. Thompson*, *R. N. Williams*, and *H. Craven*, for the appellee.

Collier v. Mahan.

COLLIER v. MAHAN.

PROMISSORY NOTES—CONTRACTS.—*A* held the promissory note of *B* for 100 dollars, dated *September 20th*, 1854, due in six months. An agreement was made between *A*, of the one part, and *C*, *D* and *E*, of the other, by which the latter agreed to pay certain debts of *A*, for which *A* transferred to them certain property, including said note, of which a schedule was made, in which it was stated that the note was assigned to them without recourse on *A*. One of said assignees afterwards transferred the note to *F*, who probably knew that the assignment by *A* was without recourse. After the note was transferred to *F*, *A* indorsed it, but without consideration. Due diligence was used to collect the note of *B*.

- Held*, 1. That if the indorsement of the note by *A*, and the execution of the assignment, as stated in the schedule, without recourse on him, were concurrent acts, they should be construed together as constituting but one contract, which contract, so construed, exempts *A* from further liability.
2. But, if the indorsement by *A* was made after the note came into the possession of *F*, *A* is not liable thereon, because his indorsement was without consideration.
3. Parol evidence is admissible to show that a written contract was made without consideration.

APPEAL from the *Putnam* Common Pleas.

WORDEN, J.—Action by *Collier* against *Mahan* upon his indorsement of a promissory note. Issue, trial, verdict and judgment for the defendant.

The facts, so far as it is necessary to state them in order to an understanding of the merits of the case, are as follows: The defendant held a promissory note against *Thomas Loftus* for over 900 dollars, dated *September 20*, 1854, due six months from date. An agreement was entered into between the defendant of the one part, and *Wm. S. Mahan*, *David W. Standiford* and *William W. Standiford* of the other, by which the

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latter agreed to pay certain debts of the defendant, for which the defendant transferred to them certain merchandise, notes and accounts, amongst which was the note in question. At the same time a schedule of the notes, &c., was drawn up and the assignment made, as expressed in the schedule, without recourse on the defendant. One of the assignees afterwards transferred the note in question to *Collier*, who knew the assignment had been made without recourse. The note appears to have been indorsed by the defendant, but it appears from the evidence that the indorsement was not made until after it came into the hands of *Collier*, from whom, however, the defendant never received any consideration for the indorsement. The inference is that it was indorsed for the purposes only of a suit by *Collier* against the maker. It may be observed that the defendant's is the only name upon the note, and his indorsement is in blank. Due diligence had been used to collect the note of the maker, with only partial success.

We regard it as immaterial whether the indorsement was made by the defendant at the time of the assignment to *Wm. S. Mahan* and the *Standifords*, or not until after the note came into the hands of *Collier*; as, upon either hypothesis, the defendant is not liable on his indorsement. If the indorsement of the note and the execution of the assignment without recourse upon the schedule mentioned were concurrent acts, they are to be construed together as constituting but one contract, and that contract, by its terms, cuts off any recourse on the defendant. *Leach v. Leach*, 4 Ind. 628; *Thompson v. Allen*, 12 Ind. 539; *Woodward v. Mathews*, 15 Ind. 339. This in no manner violates the rule that parol evidence can not be admitted to contradict or vary the effect of a written instrument. The two papers are in writing, and both constitute, in effect, but one instrument.

It is equally clear that if the indorsement was made after

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the note came into the hands of the plaintiff, he can not recover thereon, because he paid the defendant nothing for making such indorsement. If the indorsement was then made, it was a contract between the plaintiff and defendant and no one else; and being without consideration, no action will lie upon it against the defendant. Though parol evidence can not be admitted to vary the effect of a written instrument, it is admissible to show that a written instrument was made without consideration.

The judgment below appears to have been right upon the merits, and must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

J. A. Matson, J. A. Scott and D. R. Eckels, for the appellant.

Williamson & Daggy, for the appellee.

JEFFRIES v. SHERBURN et al.

LIEN OF JUDGMENT—SHERIFF'S SALES.—A judgment is no lien on land, which the debtor holds by a bond, or school land certificate issued by a county auditor under the school law, conditioned for the execution of a title on payment of the purchase money, though he had taken possession and paid the money before the rendition of the judgment; and a sheriff's sale, on execution against the obligee of land so held, conveys no estate to the purchaser.

APPEAL from the *Posey* Circuit Court.

DAVISON, J.—*Jeffries*, who was the plaintiff, sued *Sherburn* and *Whitworth* for the recovery of land in *Posey* county, described as the "north-east quarter of the north-east quarter,

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of section 16 in township 7, south of range 4 west." The complaint is in the usual form. *Sherburn* filed a disclaimer. *Whitworth* answered: 1. By a denial. 2. That he holds possession of the land under and by virtue of a school land certificate, or bond, issued by *Thomas F. Prosser*, auditor of *Posey* county, to *Francis A. Ashworth*, on the 15th of *April*, 1856, and he, on the 6th of *March*, 1857, assigned the same land to *John Hershman*, who, on *January* 21st, 1862, assigned it to the defendant, and that the assignment of the bond to the defendant vested in him all the right, title and interest in and to the land. Wherefore, he says that he is the owner thereof, and entitled to the possession, &c. The bond was filed with the complaint, bears date *April* 15th, 1856, and stipulates as required by the statute. See 1 R. S. pp. 451 and 452, §§ 99, 100 and 107. To this answer the plaintiff replied, "that the land described, &c., was, on the — day of *November*, 1861, sold by the sheriff of said county, by virtue of sundry executions against *John Hershman*, the defendant's assignee, and purchased by the plaintiff, who, pursuant to the sale, received a sheriff's deed, &c. Defendant demurred to the reply. The Court sustained the demurrer and final judgment was given, &c.

The action of the Court in sustaining the demurrer raises the only question in the case. Did the sheriff's deed invest the plaintiff with the right to possess the land? *Hershman*, when the sheriff made the sale, had a certificate of purchase, which entitled him to a deed in fee, within ten years from the date of the certificate, provided he had, within that period, paid the purchase money and interest as stipulated in the contract of sale. And this Court has decided that "a judgment is no lien on land which the debtor holds by bond conditioned for the execution of a title, on payment of the purchase money, though he had taken possession and paid the money before the rendition of the judgment, and a sheriff's

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sale, on execution against the obligee of the land so held, conveys no title to the purchaser." *Modisett v. Johnson*, 2 Blackf. 431. The appellant, however, concedes that a mere equitable interest in land can not be sold on execution, but contends that "the statute regulating the sale of school lands gives the purchaser, holding by certificate, and before payment, a well defined legal interest and estate in the premises." We are not inclined to adopt that position. In *Dickerson v. Nelson*, 4 Ind. 160, it was held that, "a certificate for canal land which shows on its face that part of the purchase money is unpaid, is not evidence of legal title." And it seems to us that the certificate in this case invests *Hershman* with no other or greater interest in the land than he would have had under an ordinary title bond, or a certificate for canal land. It is true, the statute gives "every purchaser" of school lands, "until forfeiture" by failing to pay the annual interest as "the same becomes due," the right of possession. 1 R. S. pp. 451, 452, §§ 100, 108. But this makes the certificate of the auditor give precisely the same interest which would be given by a title bond, with a clause giving the purchaser possession of the premises during the time allowed for payment. If this position be correct, and we think it is, the interest of *Hershman* in the land, under the certificate, was not as contended, "a well defined chattel real." See 1 Bouvier's Inst. 184; 2 Kent's Com. 342; but a mere right in equity coupled with possession, which, as we have seen, is not a leviable interest. *Modisett v. Johnson*, *supra*. Indeed the mode usually adopted by a judgment creditor to subject the equitable estate of his debtor to the payment of the judgment, is to institute a suit under the statute which regulates "proceedings supplementary to execution." 2 R. S. p. 152; *Figg v. Snook*, 9 Ind. 202.

Per Curiam.—The judgment is affirmed, with costs.

John Pitcher, for the appellant.

Ellis Lewis, for the appellees.

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JOHNSON v. RUNYON *et al.*

MARRIED WOMEN, PROPERTY OF.—Section 5 (1 G. & H. p. 374,) includes lands which the wife may acquire by purchase, as well as in other modes.

SAME.—Personal property acquired by a married woman, with the profits of her real estate, does not become the property of her husband by being left in his possession and use, and a sale of it on execution, for the payment of his debts, would not divest her title, or convey any title to the purchaser.

APPEAL from the *Johnson* Common Pleas.

DAVISON, J.—Replevin by the appellant, who was the plaintiff, against *Runyon* and *Crow*, to recover a horse. The issues were submitted to a jury, who, in answer to certain questions of fact, propounded to them at the instance of the plaintiff, found specially, and who, also, found a general verdict for the defendants. Motion for a new trial denied, and judgment.

It appeared in evidence, that the defendant, *Crow*, as constable, held two executions in favor of his co-defendant, *Runyon*, and against *Charnel C. Johnson*, the husband of the plaintiff, which were, by him, levied upon the horse in controversy, as *Johnson's* property. And hence this inquiry arises: Does the horse belong to the plaintiff? The evidence proves substantially these facts:

In *January*, 1861, the plaintiff bought of one *Moses Holman* a tavern stand, in the town of *Franklin*, known as the *Johnson House*, for which he gave her a bond for a deed, upon the payment of the purchase-money. The consideration of the sale, as stated in the bond, was 700 dollars, viz: 100 dollars in hand, and the residue in installments of 200 dollars each, payable in one, two, and three years from the day of sale. The contract of sale was made at *Johnson's* house, and the plaintiff and her husband were both present; but the con-

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tract was made with her. In *February*, 1861, the plaintiff and her husband executed a lease of the tavern stand to one *Beverly Dickerson*, for the yearly rent of three hundred dollars, who, in *June*, 1861, sent the horse in question to the plaintiff, in payment of rent, for which she executed to him a receipt, as follows:

“*Franklin, June 25, 1861.*

“Received of *Beverly Dickerson* one horse, at 100 dollars, on rent, for *Johnson House* property.

“CHARLOTTE JOHNSON.”

The horse was delivered at the house of *Charnel C. Johnson*, the plaintiff's husband, and both she and her husband were present when the delivery was made. *James Crow*, the constable, being called, testified thus: “I levied on the horse as the property of *Charnel C. Johnson*. The levy was made in the evening of the 25th of *June*, 1861, by the direction of *Runyon*, the execution plaintiff. When I first went to *Johnson's* for the horse, I demanded property of him; but he declined giving any. *Johnson* told me that the horse was in his stable. I went to the stable. *Johnson* opened the stable door, put the halter on the horse, and led him out. The stable was on the lot occupied by *Johnson*.” There was evidence tending to prove that the plaintiff, prior to the purchase of the *Johnson House*, had no property or money of her own; that *Johnson*, before the horse was delivered, told *Dickerson* that the plaintiff would receive him in payment of the rent, and that she, plaintiff, had paid to *Holeman* 37 dollars of the purchase-money, &c.

Upon the defendants' motion, the Court thus instructed the jury: “1. If the horse was purchased by *Mrs. Johnson*, with her own money, or if she got him on payment of rent due her, and, afterwards, the horse came into the possession of her husband, the horse is subject to the execution. 2. If

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the plaintiff and her husband lived together, and the horse was found on the premises on which they resided, under the control of the husband, it would amount to a possession, in law, by the husband."

These instructions, in effect, concede that the property, when the plaintiff received it, was her separate property; but they assume, that the mere fact that it came into the possession, and was under the control, of her husband, made it subject to the execution, as his property. It is not important to inquire, whether, in view of the common law rule, the doctrine enunciated in the instructions would be correct; because their validity depends on the construction to be given to our statutes in relation to the rights of married women. The revision of 1852 provides, that "no lands of any married woman shall be liable to the debts of her husband; but such lands, and the profits arising therefrom, shall be her separate property, as freely as if she were sole and unmarried: *provided*, that such wife shall have no power to incumber, or convey such lands, except by deed, in which the husband shall join." 1 R. S. G. & H. p. 374, sec. 5. It may be noted, "that this section is not limited to lands acquired by devise, descent or gift, as is the case with personal property." *Id.* p. 295. *Cox's Adm'r v. Wood et al.*, 20 Ind. 54. But it includes lands which the wife may acquire by contract of purchase, and declares, that "the profits arising therefrom shall be her separate property." Now, if the horse in question was a profit arising from her real estate—and the instructions concede, hypothetically, that it was—the property in it became vested in the plaintiff, as her separate property, and it was not, as we construe the statute, subject to her husband's debts. As the plaintiff and her husband resided together, the property may be regarded as having been in his possession and use, and that would be *prima facie* evidence of ownership. Still, however, the title to the property was in the plaintiff, and

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not in her husband. He could not have lawfully sold it, because, as a general rule, and this case is not an exception, "one who has no title to a chattle, can give no title." Story on Sales, sec. 199. And it is equally clear, that a sale of the property, on execution, for the payment of his debts, would not divest the plaintiff of her title, nor would it convey any title to the purchaser. The appellee refers to *Mahoney v. Bland*, 14 Ind. 176, but that case is not in point. We are of opinion that the instructions, to which we have referred, should not have been given, and on that ground alone the judgment will be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

T. W. Woolen and C. F. McNutt, for the appellant.

Overstreet & Hunter, for the appellees.

SINGLETON v. PIDGEON.

DISCONTINUANCE—SPECIAL JUDGE.—When, under the provisions of sections 207 and 208 of the code, (2 G. & H. p. 154,) a judge, other than the regular judge of the Court, is called in by the regular judge, to try causes which he is incompetent to try, and such other judge fails to appear at the time designated for the trial of such causes, they are not thereby discontinued, but should be passed to, and continued upon, the general docket of the causes pending in said Court.

APPEAL from the *Bartholomew* Circuit Court.

Per Curiam.—The law of *Indiana* provides, that in four cases a judge may be called in by the regular judge of the Court, to try causes in his stead.

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1. Where the regular judge of the Court is interested, &c.
2. Where he is of kin to either party.
3. Where he is a witness in the cause.
4. Where there is an affidavit of prejudice. 2 G. & H. p. 154.

In such cases, where the judge called in fails to appear at the time designated for the trial, or, appearing, fails to finally try the cause, the same is not discontinued, but passes to, and continues, by operation of law, upon the general docket of causes pending in said Court. A change of judge, in such case, does not work a change of Court. The Court continues the same. Public policy requires this rule.

The judgment is reversed, with costs. Cause remanded, with instructions to reinstate the cause upon the docket.

R. Hill, for the appellant.

S. Stansifer and Francis T. Hord, for the appellee.

WORGANG'S ADM'R V. CLIPP *et al.*

BONDS OF EXECUTORS AND ADMINISTRATORS.—The bond given by an administrator, upon his appointment, (under section 19, 2 G. & H. p. 489,) is designed alone to secure the faithful administration of the personal property of his intestate, and the proceeds of the sale of such real estate as shall be sold in pursuance of the terms of a will, and such bond can cover only breaches of that trust.

BOND ON SALE OF REAL ESTATE BY SAME.—But if, in the course of the settlement of an estate, it becomes necessary to sell other real estate, and an additional bond is then given, (under section 82, 2 G. & H. p. 510,) the latter bond is designed only to secure the faithful discharge of the new duties thus imposed upon him, and the bond so given can only cover the neglect of duty in the administration of the proceeds of such real estate.

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APPEAL from the *Harrison* Circuit Court.

PERKINS, J.—*Rising*, administrator *de bonis non* of *Worgang's* estate, sued upon the bond of the original administrator, who had been removed for malfeasance in office. The bond was as follows:

“Know all men by these presents, that we, *Isaac Clipp* and *Philip Robald*, are bound unto the State of *Indiana* in the penal sum of 400 dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators. Sealed and dated the 15th day of *September*, 1856.

The condition of above obligation is, that if the above bound *Isaac Clipp*, shall well and truly discharge the duties of his trust as administrator of the estate of *Joseph Worgang*, deceased, according to law, then the above obligation is to be void, else to remain in full force.

“ISAAC CLIPP, [SEAL.]

“PHILIP ROBALD, [SEAL.]”

The bond was duly approved.

The breaches alleged were that *Clipp* had wasted personal property of the estate and the proceeds of real estate sold for the payment of debts.

The Court held the defendants liable on the bond for the personal estate wasted, but not for the proceeds of the real estate. The means, in *Indiana*, for payment of the debts of deceased persons are divided into two funds, primary and secondary.

The primary consists of personalty, and such real estate as may be directed by will to be sold.

The secondary consists of the real estate, generally, of the deceased.

Upon granting letters of administration it is not presumed that the secondary fund will have to be resorted to, and,

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hence, it is not considered in issuing the letters and taking the bond. The primary fund only is taken into account, and the bond given is simply to secure the proper appropriation of that. This is evident from the statute. It enacts:

"SEC. 19. Every person appointed executor, administrator with the will annexed, or administrator, before receiving letters, shall execute a separate bond, with sufficient resident freehold sureties, to be approved by the proper clerk or court, jointly and severally bound, in a penalty payable to the State of *Indiana*, of not less than double the value of the personal estate to be administered, and, in case real estate is to be sold by the terms of a will, also double the value of such real estate, conditioned that he will faithfully discharge his duties as such executor or administrator, and shall take and subscribe an oath or affirmation, that he will faithfully discharge the duties of his trust according to law, which oath or affirmation, attested by the clerk, shall be filed and recorded as part of the proceedings of the estate; and such clerk or court shall examine, under oath, such person, or any other person, touching the value of such personal estate, and, in case real estate is to be sold by the terms of a will, the value of such real estate; and shall also examine such sureties, under oath, as to the value of the property they own, more than their indebtedness; which oaths shall be taken and subscribed by such person or persons, and such sureties, respectively, and filed as a part of the proceedings in such estate." 2 G. & H. 489.

The trust of the administrator by his original appointment extends only to the duties imposed by the foregoing section; and we think it plain that the bond then given can cover only breaches of that trust.

If it becomes necessary, in the course of the settlement of the estate, for the administrator to resort to the secondary fund, he assumes an additional trust, becomes burdened with

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new duties, and is required to give a new bond to cover the new trust. The first and second trusts and bonds are kept distinct by statute. When the Court is asked by an administrator for an order to sell real estate, the statute enacts that:

"SEC. 82. Previous to the making of an order for any such sale, the executor or administrator shall file in the office of such Court a bond, payable to the State of *Indiana*, in a penalty not less than double the appraised value of the real estate to be sold, with sufficient freehold sureties, to be approved by the Court, and conditioned for the faithful discharge of his trusts according to law." 2 G. & H. 510.

It seems to us that, under these statutes, the sureties in the several bonds are liable only for the respective funds they are executed to secure, and that the decision of the Court below was right and should be affirmed.

It has been held, at this term, in *The State ex rel., &c. v. Steele*, that where a guardian gave an additional bond on obtaining an order for the sale of real estate of his ward, and afterwards made the sale, brought the proceeds into Court, took them out again by leave of the Court, and was afterwards sued on the bond so given for wasting them, the record not showing that they had ever been applied to the purposes for which the sale was ordered and made, or that the sureties in said bond had been discharged by any order of Court, or that the proceeds of said sale had been carried, by order of Court or otherwise, into the general fund in the hands of the guardian, as such generally, the sureties on the second bond were liable to the ward for the money.

Per Curiam.—The judgment is affirmed, with costs.

Thos. L. Smith, M. C. Kerr and Willett Bullitt, for the appellant.

Walker v. Clifford.

WALKER v. CLIFFORD.

WITNESS—STATUTES CONSTRUED.—Where a part of the estate of an intestate is the promissory note of *A*, and the whole estate is appraised at less than 300 dollars, and is therefore under the provisions of the Decedent's Estates' Act, delivered to his widow, and she sues *A* on said note, who pleads defences going to the merits, *A* is not rendered an incompetent witness in his own behalf by the terms of the last proviso of section 3, of the act of *March 11, 1861*, (2 G. & H. p. 168).

APPEAL from the *Vanderburgh* Circuit Court.

WORDEN, J.—*James T. Walker* made certain promissory notes to *John Clifford*. *Clifford* died, and his estate, being appraised at less than 300 dollars, was ordered by the Court to be delivered over to his widow, *Kate Clifford*, under the provisions of the statute. 2 R. S. 1852, p. 279, sec. 133 *et seq.* This suit was brought by the widow upon the notes. *Walker* pleaded defences going to the merits. On the trial he offered himself as a witness, but was rejected, and exception taken. This ruling was erroneous. *Walker* was a competent witness, the statute having made him such. Acts 1861, p. 52. The case does not come within the proviso: "That in all suits where an executor, administrator or guardian is a party in a case where a judgment may be rendered for or against the estate represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness," &c. *Dahony v. Hall et al.*, 20 Ind. 264.

Per Curiam.—The judgment is reversed with costs, and the cause remanded for a new trial.

Lewis C. Stinson, for the appellant.

Cooper et al. v. Cooper et al.

COOPER *et al.* v. COOPER *et al.*

WILL.—On *January 23, 1860*, *A* sold to *B* a tract of land for 800 dollars, of which 200 dollars were paid at the date of sale, and the balance was agreed to be paid in annual installments of 100 dollars each, and was to be secured by notes, and a mortgage on the land. *A* executed a deed to *B* for the land, and delivered it to a third person, as an escrow, to be given to *B* on his execution and delivery of the notes and mortgage. On *May 29, 1860*, *A* died, and by his will, executed the day before his death, he devised to his wife, *C*, and to his daughter, *D*, a certain town lot, being all the real estate he then owned, except such interest as he then had in the land sold as aforesaid. He also devised to his wife, *C*, the proceeds of all debts due him, after the payment of his debts, and to *E* and *F* all other lands which he then owned. On *January 8, 1861*, administration, with the will annexed, was granted to *G*, on the estate of *A*, and the notes and mortgage aforesaid were then executed and delivered by *B* to such administrator. *E* and *F* claim the notes, under the will.

Held, That *E* and *F* take nothing under the provisions of the will, because, by the sale of said land as aforesaid, the estate of the vendor therein was converted into a money fund, which went to the personal representative, and the residue, after the payment of debts, would belong to *C*, the widow, under the will.

APPEAL from the *Miami* Common Pleas.

WORDEN, J.—On the 23d day of *January, 1860*, *Charles G. Cooper*, now deceased, sold to *Jacob Springer* a certain parcel of real estate, described in the complaint herein, for the sum of 800 dollars, 200 of which was paid down by *Springer*, and the residue was to be paid in 100 dollar annual payments. At the time of the sale, *Cooper* executed a conveyance of the premises to *Springer*, but *Springer's* wife not being present to execute a mortgage, to secure the unpaid purchase-money, the deed from *Cooper* to the purchaser was left in the hands of *R. P. Effinger, Esq.*, to be delivered to *Springer* when he

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should execute notes, to secure the purchase-money, with a mortgage, to be signed by his wife.

On the 29th of *May*, 1860, *Charles G. Cooper* died. On the day before his death, he executed his last will and testament, by which he devised to his wife, *Eliza*, and his daughter, *Julia Isabel Cooper*, a certain house and lot in *Peru*, he then owning, as is alleged, no other real estate, except the house and lot thus devised, and the land thus sold to *Springer*. The will contains the following further items necessary to be noticed here:

"I further will and devise to the said *Eliza* the proceeds of all debts due to me, after all my just debts shall have been paid. Item Third: I further will and devise to my parents, to-wit: *William* and *Lucy Cooper*, or to either of them who may survive me, all other lands and tenements, of which I am now seized, or of which I am now the owner, the same being situated in the said county of *Miami*."

On the 8th of *January*, 1861, administration, with the will annexed, having been granted to *Alvin Crippen*, on the estate of the deceased, the notes and mortgage contemplated by the contract, for the sale of the land, were executed to the administrator, by *Springer* and wife, and the deed was delivered to *Springer*.

This suit was brought by *William* and *Lucy Cooper* against the administrator, who has received a part of the purchase-money, and against *Eliza Cooper*, who claims the whole of it, under the will.

The plaintiffs claim, that as the legal title to the land was in *Charles G. Cooper* at the time of his death, it passed to them under the will, and they take it, subject to the contract of sale, and are therefore entitled to the proceeds, instead of the land itself. Judgment below for the plaintiffs. This judgment will have to be reversed.

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The following authority seems to be decisive against the plaintiffs' right to the money:

"Where the testator contracts to sell the devised estate, and dies, without having executed a conveyance to the purchaser, the devise remains in full force as to the legal estate, and no further, this being all the interest the testator has to dispose of at the time of his decease; and the conversion, as between the real and personal representative, being completely effected by the contract, (supposing it to be a binding one,) the devisee, it is conceived, takes only the legal estate, and the purchase-money constitutes a part of the testator's personal estate. * * * In the case of *Knollys v. Shepherd*, 1 J. & W. 499, where *K.*, having contracted with *M.* for the sale of an estate at *F.*, afterwards devised it to his wife, by the description of 'all that my estate which I have contracted to sell to *M.*,' it was held that this was nothing more than a devise of the legal estate, to enable her to carry the contract into execution, and did not operate as a legacy of the purchase-money. In making these observations, it is not forgotten, that, by the terms of the recent act, the devise takes effect in regard to any estate or interest which the testator had power to dispose of. But supposing the contract to be effectual, and binding on both parties, and no obstacle to exist to its performance, the deviser has no beneficial estate or interest to dispose of, the entire equitable ownership in the land having become vested in the purchaser, by whose will it would pass as real estate. The estate of the vendor is, in contemplation of equity, disposed of, and converted into a money fund. If this fund would pass under a particular devise of land, it must, upon every sound principle of construction, be included in a general devise, and yet it could not for a moment be contended, that, when a testator, having contracted for the sale of an estate, devised all his real estate to *A*, and his personalty to *B*, the purchase-money belonging to *A*, as

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part of his real estate, and not to *B*, as part of his personalty. Indeed, the case of *Knollys v. Shepherd* seems to set the matter quite at rest as between the particular devisee of the land and the personal representatives of the testator." 1 Jarman on Wills, p. 185, *et seq.*, (Perk. ed.) See *Donohoe v. Lee*, 1 Swan (Tenn.) R. 119, and *Farrar v. Earl of Winterlon*, 5 Beav. 1.

The 6th section of our act concerning wills, (2 R. S. 1852, p. 311,) has no application to the case, as that applies to cases of a contract for the sale of land, made after the making of a will. Here the contract of sale was made before the will.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

H. J. Shirk and *W. S. Benham*, for the appellants.

N. O. Ross and *R. P. Effinger*, for the appellees.

TEST et al. v. SMALL.

JURISDICTION—REPLEVIN.—Actions of replevin may be instituted before any justice of the peace in the county, without reference to the fact that the defendant may reside in a different township from that in which the justice resides.

APPEAL from the *Wayne* Common Pleas.

Per Curiam.—Actions of replevin may be instituted before any justice of the peace in the county where the defendant resides, though he reside in another township than that in which the suit is brought. *Beddinger's Adm'r v. Jocelyn*, 18 Ind. 325. The judgment below is affirmed, with costs.

W. S. Ballinger and *J. B. & I. F. Julian*, for the appellants.

Lafe Develin and *Geo. A. Johnson*, for the appellee.

 Matlock's Adm'r v. Straughn.

MATLOCK'S ADM'R v. STRAUGHN.

REPLEVIN—PLEADING.—It is not necessary that the answer of the defendant in replevin should claim a return of the property; but if the case made by the evidence authorizes a return, it may be awarded by the Court, after verdict.

EXECUTION—CHATTEL MORTGAGE.—Where personal property (mortgaged) continues in the possession of the mortgagor, and is taken in execution to pay his debt, it is incumbent on the mortgagee, in an action to recover the same, to show that the mortgage had been recorded within ten days after the execution thereof.

APPEAL from the *Putnam* Circuit Court.

WORDEN, J.—Action by the appellant against the appellee, to recover the possession of certain personal property. Issue, trial, finding and judgment for the defendant.

One *Wright* and others had recovered a judgment against *John W. Matlock*; and by virtue of an execution issued thereon, the defendant, as deputy sheriff, had levied upon the property in controversy, as the property of said *John W. Matlock*, the judgment defendant. The plaintiff claimed the property by virtue of a mortgage, executed by *John W. Matlock* to the intestate, *David Matlock*. The appellant claims that the Court, who tried the cause, admitted irrelevant and incompetent testimony, and that the finding was not sustained by the evidence. These objections can not prevail. Strike out all the appellant objected to, and still the finding is right. The property, after the execution of the mortgage, continued in the possession of *John W. Matlock*, and there was no proof that the mortgage was recorded within ten days, as required by law in such cases. 1 R. S. 1852, p. 801, sec. 10; *Chennyworth v. Daily*, 7 Ind. 285.

It is also objected, that the Court erred in awarding a return of the property, the defendant, in his pleadings, not having prayed such return. It was not necessary that the

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defendant, in his pleadings, should have claimed a return of the property. *Conner et al. v. Comstock, et al.*, 17 Ind. 90.

The Court rendered judgment against the plaintiff, personally, for costs. This was a mere clerical error, if erroneous, and might have been amended in the Court below, and, according to the case of *Stevenson v. Bruce*, 10 Ind. 397, will be deemed amended here. No question was made in this respect in the Court below, and it can not be made for the first time in this Court.

Per Curiam.—The judgment below is affirmed, with costs.

C. C. Nave, for the appellant.

Band & Hall, for the appellee.

NEWKIRK v. BURSON et al.

WITNESS—STATUTES CONSTRUED.—Where a mortgagor dies and the mortgagee sues the heirs and administrator of the mortgagor to foreclose the mortgage, and defences are interposed by the heirs, the mortgagee, under the provisions of the last proviso of the third section of the act of March 11, 1861, (2 G. & H. p. 168,) is a competent witness in his own behalf.

MORTGAGE—FORECLOSURE.—Where suit is instituted against the heirs and administrator of a deceased mortgagor to foreclose a mortgage, no judgment can be rendered against such administrator for the balance of the debt not satisfied by the sale of the mortgaged premises.

USURY.—Usury may exist where there is no loan of money; or where a money debt is created and forborne; or where the original contract by which a debt is created is for the purchase and sale of land, it may be usury for the vendor to demand and receive more than legal interest for the forbearance of such debt.

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APPEAL from the *Laporte* Circuit Court.

PERKINS, J.—This suit was commenced by *Benoni M. Newkirk*, the appellant, against the heirs and administrator of *Samuel Burson*, deceased, to recover the amount due on a contract executed by the said *Samuel Burson* in his lifetime, and to foreclose a mortgage. The contract is as follows, to-wit:

"I, *Samuel Burson*, of *Laporte* county, and State of *Indiana*, have this day purchased of *Benoni M. Newkirk* of the same place, certain real estate, known as his farm near *Laporte* in *Laporte* county, aforesaid, and lands connected or used with it hereinafter described, upon the terms and conditions following, to-wit: I am to pay therefore the sum of 1,650 dollars one year from date; the like sum two years from date; the like sum three years from date; the like sum four years from date; the like sum five years from date; the like sum six years from date; the like sum seven years from date; the like sum eight years from date; the like sum nine years from date, and the sum of 18,150 dollars ten years from date, all without any relief whatever from valuation or appraisement laws. All of which several sums I hereby agree to pay to said *Newkirk* or order, as they severally fall due, as above specified, subject to this express condition, to-wit: If I pay at any time within the said ten years to said *Newkirk* or the person or persons lawfully entitled to receive the same, in addition to the annual installment then due, the sum of 16,500 dollars, he or they shall receive the same, and it shall be in full discharge and satisfaction of the whole debt, and each of the said several sums of money, except as to the annual installment then next to fall due, and as to that there shall be an abatement thereon at the rate of ten per centum per annum on 16,500 dollars from the date of said payment; and the payment of the sum of 16,500 dollars as aforesaid, and the amount of said installment then next to fall due after

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the abatement as aforesaid, shall be in full satisfaction of the said several sums of money, and each and every one of them and every part thereof. And further, if I pay to said *Newkirk*, or the person or persons lawfully entitled to receive the same, at any time, in addition to the sum to be annually paid, any part of the last mentioned sum, not less than 500 dollars at a time, it shall be received, and in case of the payment on this obligation of any such additional sum less than the whole, then and in every such case there shall be a deduction equal to ten per cent. on such additional sum from each of said annual installments, except the one next to fall due, and as to that at the rate of ten per cent. per annum. And such payment shall operate as a credit upon said annual installment at the date of the said payment to the amount of ten per cent. as aforesaid upon the additional sum so paid; and the privilege above secured to me shall be extended to my heirs, executors, administrators and vendees of said real estate."

The defendants answered by a general denial and a plea of usury, which alleges that the contract and mortgage in the complaint mentioned were made in pursuance of a corrupt and usurious agreement between the plaintiff and said *Samuel Burson*, deceased, as follows: "That the plaintiff should and did sell and convey to the said *Samuel Burson* certain real estate in said mortgage described, containing about 230 acres, for the sum of 16,500 dollars, and that the plaintiff should and did forbear and give day of payment thereof for the period of ten years from the date of said agreement, and in consideration thereof said *Samuel Burson*, deceased, should and did agree to pay to the plaintiff the said sum of 16,500 dollars, at the expiration of ten years, and in the meantime should and did agree to pay to the plaintiff annually, interest on said sum at the rate of ten per cent. per annum, to-wit: the sum of 1,650 dollars, annually, from the

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date of said agreement, and that the agreement was so drawn as to evade the provisions of law against usury." They also allege that five of the annual payments had been made, which, as they state, exceeds the amount legally due on the mortgage.

Issue was formed on this answer, the cause was tried by a jury, and a verdict was rendered for the defendants, they holding the contract to be usurious.

A motion for a new trial was made and overruled.

The evidence and instructions of the Court, and certain rulings on the trial to which exceptions were taken, are incorporated in a bill of exceptions.

On the trial *Newkirk*, the plaintiff, offered himself as a witness, but the Court refused to hear him testify, under the provision of the act of 1861, which reads thus: "And provided further, that in all suits where an executor, administrator or guardian is a party in a case where a judgment may be rendered either for or against the estate represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness, unless, &c." 2 R. S. (G. & H.) p. 168.

In the case at bar, could a judgment have been rendered against the estate of *Burson*?

We have this statute in *Indiana*:

"SEC. 632. When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged.

"SEC. 633. In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs at any time before sale, shall satisfy the judgment.

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“SEC. 634. When there is an express written agreement for the payment of the sum of money secured, contained in the mortgage, or any separate instrument, the Court shall direct in the order of sale that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied of any property of the mortgage debtor.

“SEC. 635. A copy of the order of sale, and judgment shall be issued and certified by the clerk, under the seal of the Court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest and costs, as upon execution, and if any part of the judgment, interest and costs remain unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the defendant. 2 G. & H. 294.

Now, in the case of a foreclosure of a mortgage, executed by a deceased mortgagor, it is clear that the heirs of such mortgagor are the necessary parties, because the equity of redemption descends to them; and should we admit, also, that the administrator of the mortgagor may not be an improper party, as he might have paid the mortgage, or may have personal estate with which to pay it; see *John v. Hunt*, 1 Blackf. 324; *Slaughter v. Foust*, 4 id. 379; *Bryen v. Chase*, 8 id. 508; still, the question will arise, could a judgment be rendered against such administrator, under the above statute? For if such a judgment could not be rendered, then, the case is not within the proviso of the act of 1861, above quoted, and *Newkirk* should have been admitted as a witness.

We think, in a foreclosure suit, such as this was, no judgment can be rendered against the administrator of a mortgagor for the balance of the debt, not satisfied by the sale of the mortgaged premises. We think the statute does not apply to such a case, even should we admit the order for the col-

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lection of such overplus, indefinite as it must be, as to amount, and contingent, indeed, as to any amount at all, to be a judgment.

And, in expressing this opinion, we waive the question of the jurisdiction of the Circuit Court to render a judgment against an administrator; see 2 G. & H. p. 20, sec. 4; *Tyler v. Wilkerson*, 20 Ind. 473; and rest our conclusion upon the ground that the statute authorizing such order for execution for overplus after sale of mortgaged premises can not, without a violation of other rules of law, be held applicable in a case where the mortgagor is deceased.

The mortgage creates no lien, except upon the property embraced in it. Now, if, in the foreclosure of a mortgage against the representative of a deceased mortgagor, the Circuit Court can render a judgment, and order execution against the property of the deceased in the hands of the administrator, the mortgagee first foreclosing would, in effect, get priority of payment out of the estate, not only as against general creditors, but as against all mortgagees, later in foreclosing, though in the same class of creditors; but it has already been decided, as we understand the case of *Rogers v. The State*, 6 Ind. 31, that such is not the right of a mortgagee.

We think the Court erred in excluding *Newkirk* as a witness.

On the trial, the Court instructed the jury that "the forbearance of money, within the contemplation of our statutes against usury, can be based directly on the sale of land on credit."

It is for the Legislature to say upon what contracts usury may arise; and this Court has held, in two cases, that the Legislature of *Indiana* has said that usury may exist, where there is no loan of money; that it may exist where a money debt is created and forborne; that "an original contract by which a debt is created may be for the purchase and sale of

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land; and it will be, nevertheless, contrary to the statute for the vendor to demand or receive more than legal interest for the forbearance of such debt." *Hogg v. Ruffner*, 1 Black (U. S.) Rep. 118; *Borum v. Fouts*, 15 Ind. 54; *Crawford v. Johnson*, 11 Ind. 258.

Whether such contract be usurious, or simply a time piece in the given case, may be a question of intention. And whether we have rightly construed our own statute on this point is no longer an open question in this Court.

Courts of other States have held the same doctrine. The following authorities are many of them directly in point. *Torrey v. Grant*, 10 S. & M. (Miss.) Rep. 89; *Parchman v. McKinney*, 12 *id.* 631; *Thompson v. Nesbit*, 2 Rich. Law Rep. (S. C.) 73; *Evans v. Negley*, 18 S. & R. (Penn.) Rep. 218; *Ogden v. Yoder*, 5 J. J. Marsh. (Ky.) Rep. 424. See, on the subject of usury, the cases collected in 10 Bacon's Abr. (Bouv. ed.) Tit. Usury.

The following is the definition of usury in our criminal code:

"SEC. 51. Any person who shall directly or indirectly, bargain for, receive or reserve, on any contract or agreement whatever, a greater rate of interest than at the time is allowed by law, shall be fined in five times the interest so unlawfully bargained for, taken or reserved, and in any prosecution under this section, it shall not be necessary to set forth the contract or instrument by which such interest may have been bargained for, received or reserved."

Per Curiam.—The judgment below is reversed, with costs. Cause remanded.

John B. Niles, *Thos. A. Hendricks* and *Oscar B. Hord*, for the appellant.¹

James Bradley and *D. J. Woodward*, for the appellees.²

(1) It is argued by the counsel for the appellant: The authorities

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establish the principle that, if a sale of real estate is *bona fide*, and not a colorable sale to cover up a loan, and hide a usurious transaction, there can be no usury, whatever the price may be, or the mode in which it may be reserved. Bouv. Law Dic., tit. Loan; *id.* Forbearance; Chitty on Cont. 701, (7 Am. ed.); 1 Met. (Ky.) R. 663; *Cutler v. Wright*, 22 N. Y. R. 472; *Berry v. Walker*, 9 B. Mon. 464; *Mitchell v. Griffith*, 22 Mo. (1 Jones) R. 515; *Esselman v. Wells*, 8 Humph. 127; *Beete v. Bidgood*, 14 Eng. Com. Law Rep. 206; *Dry Dock Bank v. The American, &c, Co.*, 3 Comst. 344; *Leavitt v. De Launy*, 4 *id.* 364; *Brooks v. Avery*, *id.* 225; *id.* 465; *The State Bank v. Coquillard*, 6 Ind. R. 232; *White Water Valley Canal Co. v. Vallette*, 21 How. (U. S.) R. 422; *Pomeroy v. Ainsworth*, 22 Barb. 118; *Leavitt v. Pell*, 27 Barb. 323; 2 Parsons on Bills and Notes, 406; Parsons on Cont. 383, (3 ed.); *Hogg v. Ruffner*, 1 Black's U. S. R. 118.

(2) The counsel for the appellees, *per contra*, argue: Usury may be based directly upon the forbearance of money agreed to be paid for land sold on credit. *Dewar v. Span*, 3 Term. R. 425; *Spurrier v. Mayoss*, 1 Ves. Jun. 527; *Van Schaick v. Edwards*, 2 Johns. Cas. 355; *Crawford v. Johnson*, 11 Ind. 258; *Hogg v. Ruffner*, 1 Black's U. S. R. 118; *Borum v. Fouts*, 15 Ind. 50.

To constitute usury there must be an intention, knowingly, to contract for or take usurious interest. If the contract on its face stipulates for it, there is no further inquiry; otherwise the inquiry is whether there was some agreement, device or shift, *dehors* the written contract to cover usury, and the *quo animo* as well as the acts of the parties, is most important. *Bank of the United States v. Waggoner*, 9 Peters, 393. See, also, *Lloyd v. Scott*, 4 Peters, 221; *Agricultural Bank v. Bissell*, 12 Pick. 586.

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AIKEN *et al.* v. BRUEN *et al.*

ESTATE MORTGAGED—SOLD IN PARTS AT DIFFERENT TIMES.—Where the mortgagor sells portions of the land at different times, the several parcels will be liable under the mortgage in the inverse order of such sales.

VOLUNTARY CONVEYANCE.—A voluntary conveyance is good against a subsequent grantee with notice, and especially where the voluntary grantee has conveyed to a *bona fide* purchaser.

CONSIDERATION—PRE-EXISTING DEBT.—A pre-existing debt is a valuable consideration to support a conveyance.

PRACTICE IN SUPREME COURT.—It is too late to object, for the first time, to the form of demurrers, in this Court. Objections should first be made below.

PRACTICE—WAIVER.—Where a party amends, after a demurrer to his pleading has been sustained, he waives all error in the action of the Court upon the demurrer.

PRACTICE—DEMURRER.—The objection of a former action pending, can not be raised upon a demurrer, assigning for cause want of sufficient facts, but is itself a distinct cause of demurrer, and such objection can not be made, for the first time, in this Court.

PRACTICE.—Where the parties to an action, in the progress of a cause, agree in writing, that the Court shall propound special interrogatories to the jury, to be answered by them, touching certain facts, and such interrogatories are propounded, without objection, and the jury retire, and the parties then further agree that the jury may return their verdict to the Clerk, in the absence of the Court and counsel, and, if their verdict should be defective, they may "be recalled, and required to make a complete finding to said interrogatories," it is too late to object to the interrogatories.

PRACTICE—AMENDMENT.—It is too late, after verdict, to materially amend the pleadings in a cause.

PRACTICE—NEW TRIALS.—A Court is not bound to grant a new trial, although both parties desire it.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—On the 16th day of *November*, 1859, *Luther B.*

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Brady executed notes to *Samuel Brady* to the amount of 15,000 dollars, and a mortgage on certain real estate, to secure payment of them. The mortgage was duly recorded on the 17th of *November*, 1859. Afterwards, said *Luther* conveyed one-third of the equity of redemption of the mortgaged premises to *John M. Aiken*; one-third to *James J. Russell*, and one-third to *W. S. Addleman*. Afterwards, said *Samuel Brady* assigned to divers persons the 15,000 dollars of notes, secured by the mortgage above mentioned, about 3,000 dollars of which were assigned to *Luther B. Bruen*. The notes assigned to *Bruen* became due, and he filed a complaint for foreclosure of the mortgage. He alleges that the other notes secured by the mortgage are all paid.

He makes defendants to his complaint *Luther B. Brady*, the maker, and twelve other persons, assignees, severally, of some part of the 15,000 dollars of notes, or grantees of some part of the equity of redemption, or interested in it as security for claims held, &c.

Luther B. Brady, the maker of the notes and mortgage, does not set up a defence; nor does any holder of any part of the 15,000 dollars of *Luther B. Brady's* notes. *Aiken* and *Russell*, grantees, subject to the first mortgage, executed to *Samuel Brady*, and now held by the plaintiff, *Bruen*, defend; and so do certain other persons, who are interested through *Aiken*, thus: After he received from *Luther B. Brady* a conveyance of one-third of the equity of redemption, he mortgaged that third to *Samuel Brady*, to secure certain notes, now in the hands of assignees, who look to the mortgaged premises as a fund for the payment of those notes.

The defendants, then, may be said to be all second mortgagees, who are interested in defeating the first mortgage, that the second may be let in as a lien upon the entire interest in the property.

In addition to the defence against the plaintiff, common to

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all the defendants, a question is raised between the defendants themselves. It is claimed, by the first and second purchasers of parts of the equity of redemption, as against the third, that if there is a foreclosure and sale upon the original mortgage, the sale shall be of the several parts sold to different purchasers separately, in the inverse order of the times of sale to those purchasers; such is the law. *Day v. Patterson*, 18 Ind. 114; *Williams v. Perry*, 20 *id.* 437; *Brown v. Simons*, 12 Am. Law Reg. 154.

The principal defence set up by the second mortgagees to the first mortgage was, that it was given without consideration. This defence the Court below held invalid. The law is settled in this State, that a voluntary conveyance is good against a subsequent grantee with notice; and especially is this the case, where the voluntary grantee has conveyed to a *bona fide* purchaser. In the case at bar, conceding the mortgage to have been executed without consideration, it has passed to a *bona fide* holder; and his equity is surely superior to a subsequent purchaser or mortgagee with notice. There was notice in this case, as the voluntary mortgage, supposing it to have been such, was duly recorded on the day after its execution. *Paine v. Doe*, 7 Blackf. 485. Suppose one to apply to another to borrow money, and to say, I will secure you by a second mortgage on a piece of property. I am going to make a voluntary mortgage to a friend for 1,000 dollars, which he may sell and raise money on. I wish to aid him that much, and his will be the first mortgage. Now, the person applied to on such facts, loans his money, and takes the second mortgage. By what equity can he be allowed, afterwards, to come in and defeat the first? He could not, if it was void for usury. Why, then, should he be allowed to in the case at bar? *Borum v. Fouts*, 15 Ind. 50. It is settled law in *Indiana*, that a pre-existing debt is a valuable consid-

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eration to support a conveyance. *Work v. Brayton*, 5 Ind. 896.

The form of the demurrer to the answer, upon which the foregoing questions were raised and decided, is objected to in this Court, though no objection of the kind appears to have been taken below. There was no motion to reject the demurrer, nor to require it to be made more definite. Its form was as follows:

"The plaintiff comes and demurs severally to each of the following paragraphs of the answer of *Aiken, Russell and Poe*, viz: the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th, and for cause says that said paragraphs are severally insufficient to constitute a defence to the action."

The demurrer must be taken as a separate demurrer to each paragraph; *Parker v. Thomas*, 19 Ind. 212; *Fankboner v. Fankboner*, 20 *id.* 62; but we think it did not substantially conform to the statute. *Tenbrook v. Brown*, 17 Ind. 410. If the counsel had assigned for cause, that the paragraphs, severally, did not contain facts sufficient to constitute a defence, he would have added but little to his labor in drafting the demurrer, and relieved himself from considerable in answering objections to the demurrer as drawn. But, notwithstanding the demurrer was defective in form, it is too late for the appellant to obtain any advantage from that fact, in this case, as it now stands.

The record informs us that the demurrer was submitted to the Court; that the Court sustained it as to 9, and overruled it as to 8 paragraphs of the answer; that leave was granted to the defendants to amend their answer, and that afterward said defendants filed their separate amended answers, on which, it appears, issues were formed and tried, &c.

Now, so far as the Court overruled the demurrer, it did right, both because the demurrer was informal, and the paragraphs of the answer good; and, so far as it sustained the

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demurrer, the defendants were not injured, if the paragraphs of the answer were bad, which they probably were; but in addition to this, it is well settled in this State, that where a party amends, after a demurrer to his pleading has been sustained, he waives error in the action of the Court upon the demurrer. *Caldwell v. The Bank of Salem*, 20 Ind. 294.

The answer of a part of the defendants to this suit, showed that they had a suit already pending upon the second notes and mortgage; but there was no replication in abatement, no demurrer, nor objection of any kind, on that ground. The objection of a former action pending could not be raised upon a demurrer, assigning for cause want of sufficient facts; and, hence, where the objection was not taken by demurrer, or plea, it could not be first raised upon appeal. Another action pending is, of itself, a separate, distinct cause of demurrer, by statute. It is not an objection going to jurisdiction, or the foundation of the action or defence. Hence, it can not be first raised on appeal.

The Court correctly suppressed a part of a deposition containing hearsay evidence, and refused to suppress parts of certain depositions, but the bill of exceptions does not inform us what parts, nor what the objections were to any parts, and the Clerk is not authorized to speak for the Court on such points. During the trial, the following agreement was executed and made a part of the record:

“It is agreed, by and between all the parties in this cause, that the Court shall propound to the jury interrogatories, as to certain material questions of fact in dispute, under the various issues, which have been drawn up by the Court; that, after the jury shall have returned a verdict in answer to said interrogatories, the Court shall take the facts so found as true, and, from the evidence and admissions of the parties, as to other questions involved in the issues, including all cal-

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culations as to amounts and interest, shall make such general finding of law and fact, as by the Court shall be deemed proper, saving to the parties all exceptions of errors of law or fact in the case.

“SIDDALL & PERRY, for plaintiffs.

“JOHN F. KIBBEY, for *Keeper*, &c.

“BICKLE & BURCHENAL, for *Aiken* and *Russell*.

“LEWIS D. STUBBS, for *W. & E. Sinix* and *A. F. Scott*.”

The Court accordingly propounded two series of interrogatories, each consisting of some five or six in number, to the jury. No exception was taken to them, and no request for any in addition. And, “after the jury had retired for deliberation, it being *Saturday* evening, it was agreed between the parties to the suit, that the jury might return their verdict to the clerk in the absence of the Court and counsel, and if said verdict should be found in any way defective, the jury should be recalled, and required to make a complete finding to said interrogatories;” thus again assenting to the interrogatories as drawn and given to the jury.

We think it was too late, after a return of the finding of the jury, to object, for the first time, to the interrogatories. It was also too late, after verdict, to materially amend the pleadings, and mere formal amendments may be regarded here as made.

The plaintiff moved for a new trial; the defendants conditionally assented to it; the plaintiff withdrew his motion; the defendants moved for a new trial; the Court overruled the motion. The Court was not bound to grant a new trial, even though both parties were willing for it. If the Court was satisfied with the trial had, it was not bound to waste its time in witnessing voluntary contests of the parties in the judicial forum or elsewhere. The third interrogatory propounded by the Court was as follows:

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"3. At the time *Brady* sold and conveyed the *Quaker City Works* to the defendant, *Russell*, (February 7th, 1860,) did *Samuel Brady* state to *Russell*, as an inducement to the purchase, that he then held, or had the control of, the notes sued on by the plaintiff, (2,100 dollars,) and that they should not be a lien on said property, but that said property so sold to *Russell* should be discharged therefrom?"

The answer was as follows:

"*Samuel Brady* stated to *Russell*, as an inducement to purchase, that he then had the control of the notes sued on by the plaintiff; and the notes, amounting to 2,100 dollars, should be discharged therefrom."

We think the answer substantially responds to the interrogatory. The Court could scarcely misapprehend its meaning and effect.

Objections are made to the amount and terms of the judgment, which is special, in the form of an old decree in chancery. We think we can not pass upon these objections. The agreement of the parties, above copied, was, that the Court should make up its judgment from:

1. The answers of the jury.
2. The evidence given in the cause.
3. "The admissions of the parties as to other questions involved in the issues, including all calculations as to amounts and interest."

Now, there is nothing in the record showing what was before the Court under this third specification. Hence, we can not review its action. We must presume the facts before the Court justified the judgment upon the several issues. The final judgment, is, therefore, affirmed, with 1 per cent. damages and costs.

Per Curiam.—The judgment is affirmed accordingly.

Wm. A. Bickle and *Chas. H. Burchenal*, for the appellants.

J. Perry and *J. P. Siddall*, for the appellees.

Rawley v. Hooker.

RAWLEY v. HOOKER.

CONTRACT—SHERIFFS' SALES—APPRAISEMENT—MERGER.—Promissory note executed in 1840, prior to the existence of any law on the subject of appraisement in *Indiana*. Judgment was recovered thereon in 1845, after the taking effect of such a law, but the judgment was silent as to the mode of its collection, and it was not required, by any law then in force, to specify the manner of its collection. Real estate was afterwards sold on execution, without appraisement, to satisfy the judgment, notwithstanding the law, in force at the date of the judgment and sale, required appraisement.

Held, 1. That, as the law in force at the date of the contract did not require any appraisement, the plaintiff in the judgment had the constitutional right to have it collected on execution, without appraisement.

2. That the act of *February 11, 1843*, so far as it attempts, in this respect, to control the enforcement of contracts, executed before its passage, is unconstitutional and void.
3. That the sale without appraisement was valid, and that it was not necessary, for direction so to sell, to be contained in the judgment.
4. That the sheriff, in order to determine the proper mode of sale, may examine the record of the judgment to ascertain the date of the contract, or may ascertain the same from evidence *de hors* the record, and the same evidence will be competent to sustain the validity of the sale in any action concerning the title so acquired.
5. That it is not the imperative duty of the sheriff to look beyond the judgment to ascertain his duty in this respect, and he will incur no liability by neglecting to do so.
6. That the contract was not merged in the judgment in such sense as to prevent a reference to it to determine the rights of the parties growing out of the contract.

APPEAL from the *Clay* Circuit Court.

WORDEN, J.—Action by *Rawley* against *Hooker* to recover possession of certain real estate. Judgment for the defendant. The facts are, that the land belonged originally to the

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plaintiff; but in *April*, 1845, the defendant, *Hooker*, recovered a judgment, in the *Clay* Circuit Court, against the plaintiff herein; and an execution being issued upon the judgment, the land in controversy was levied upon, and sold by virtue thereof, the defendant becoming the purchaser, and receiving the sheriff's deed therefor. The land was sold without appraisement. The judgment itself gave no directions as to the manner of collection in reference to the appraisement laws. The validity of the sale—it having been made without appraisement—is the only question involved in the case. The record of the action in which the judgment was recovered, was offered and given in evidence by the defendant, the plaintiff excepting, from which it appeared that the judgment was rendered upon two promissory notes, executed by said *Rawley*, and bearing date the 11th of *December*, 1840.

As no appraisement laws existed at the date of the notes, it is clear that the sale was properly made without appraisement, unless the judgment, being rendered in the ordinary form, and not directing collection without appraisement, precluded the defendant from going behind it, and showing, by the record, that the case was such an one as authorized a sale without appraisement.

It is insisted, by the appellant, that, inasmuch as the judgment did not direct the collection without appraisement, a sale could not be validly made without appraisement; that the judgment merged the notes sued upon, and should have been collected in accordance with the appraisement laws in force at the time of its rendition.

Was it necessary that the judgment should have directed its collection, without appraisement, in order to give the plaintiff therein the benefit of the law in force at the date of the contracts? A proper answer to this question settles the whole case.

It may be observed, that at common law the practice was
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wholly unknown of directing in a judgment the manner in which it was to be collected. A Court of common law gave a judgment for the recovery of the debt, but did not, in the judgment, give any direction as to the manner of collection, unless authorized by particular statutes. Had we any statute at the date of the judgment in question, that authorized or required that the judgment in a case like the present should specify the manner in which it should be collected? We are not aware of any such, and believe none existed. Appraisement laws were passed in 1841 and 1842. Then came the act of *February* 11th, 1843, (R. S. 1843, p. 1044,) which was in force at the time the judgment in question was recovered. None of these acts contemplated, so far as we can perceive, a waiver of the benefit of the appraisement by contract. The act of *February* 13th, 1843, (acts 1843, p. 52,) provides for waiving the benefit of the appraisement laws in certain cases, and for entering judgment accordingly. See *Doe v. Craft*, 2 Ind. 859. This statute has no application to the case before us. There the judgment was collectable without appraisement, not because the notes waived appraisement, nor because the case came within the provisions of the statute cited, authorizing judgments to be rendered in certain cases waiving appraisement, but because the notes, upon which the judgment was rendered, were executed before the appraisement laws were passed.

The appraisement law in force at the date of the judgment in question was broad in its terms, and embraced such cases as the present. It provides that: "No property of any description whatever, either real or personal, shall be sold on execution, or by virtue of any other process issued by any officer of this State, for a less sum than its fair value at the time of such sale, after deducting all encumbrances thereon, except as hereinafter provided." See act of *February* 11th, 1843, *supra*. This language embraces "executions" or other

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“process” issued upon judgments recovered upon contracts entered into before as well as after the passage of the law. The only reason why the judgment in question was not governed by the appraisement law cited, is because the law, if applied to contracts entered into before its passage, is unconstitutional and void. The Legislature had not provided for judgment to be rendered in such case to be collected without appraisement. The judgment being one which the plaintiff therein had the constitutional right to have collected on execution without appraisement, and the Legislature not having provided for rendering a judgment in such case in any other than the ordinary common law form, we see no impropriety in permitting a sale to be made in accordance with the constitutional rights of the plaintiff therein; and, upon a question being made as to the validity of the sale, permitting the record to be used to show the facts which authorized the sale to be made without appraisement. Perhaps, also, evidence *dehors* the record would be legitimate, but none such was offered. The record itself showed that the notes upon which the judgment was rendered, bore date in 1840, and that was *prima facie* sufficient evidence that they were then executed.

Perhaps the officer holding the execution would not be required to look beyond the execution, and determine at his peril whether he should sell with or without appraisement, but if he sells without appraisement, and it turns out that the sale was right, there can be no good reason for holding the sale void. Perhaps the better practice in such cases would be to procure an order of the proper court after the rendition of the judgment, directing the manner of sale, as was done in the case of *Lane v. Fox*, 8 Blackf. 58.

There are several cases decided in this Court that go upon the theory that, where a judgment is silent upon the subject of appraisement, evidence is admissible to show that it was rendered upon a contract entered into before the passage of

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appraisement laws, and therefore not governed by them. These cases can not all be well reconciled with the contrary doctrine. *Vide Lane v. Fox, supra; Stewart v. Vermilyea*, 8 Blackf. 56; *Tevis v. Doe*, 8 Ind. 129; *Babcock v. Doe*, 8 Ind. 110; *Hutchins v. Hanna*, 8 Ind. 538; *Doe v. Collins*, 1 Ind. 24; *Small v. Ely*, 9 Ind. 177.

The argument is pressed upon our consideration that the judgment merged the notes upon which it was founded, and therefore that the parties were precluded from going behind it. To be sure, the notes were merged in the judgment, but it does not seem to us to follow necessarily that the parties could not go behind it in order to determine their rights in relation to the mode of collection as to appraisement. There are many cases that furnish clear analogies, and are in principal strictly in point. Thus in *Johnson v. Fitzhugh*, 3 Barb. Ch. R. 360, it was held that "in ordinary cases, although a judgment technically changes the nature of the debt, it is still in fact the same debt which was due at the commencement of the suit; and if contracted previous to the institution of proceedings in bankruptcy, it will be barred by the discharge, when such discharge is obtained subsequent to the entry of the judgment." In *Wyman v. Mitchell*, 1 Cow. 316, it was held that in an action of debt upon a judgment, rendered in the State of *New York*, the plaintiff was not estopped to show that the judgment sued upon was rendered on another judgment obtained in another State, which last mentioned judgment was obtained upon a contract made and to be performed there, before the passage of the insolvent laws of *New York*, in order to avoid the operation of those laws. In the case last cited the Court cite another case, with the following remarks: "The doctrine of merger is unconnected with the question. In the matter of *Wendell*, 19 Johns. 153, judgment was rendered against the insolvent in 1816, on a note given in 1812. The discharge was in 1817. In this case

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the simple contract was merged; yet the Court do not consider the judgment as fixing the time when the cause of action accrued so as to give effect to the discharge, but the contract was made when the note was given. It was then competent for the plaintiff to show that the original demand was prior to the passage of the act." Again, in *Clark v. Rawlings*, 3 Comst. 216, it was held that "a judgment upon a contract technically merges the demand, but not in so complete a sense that the courts may not look behind the judgment to see upon what it is founded for the purpose of protecting the equitable rights connected with the original relation of the parties." Other cases might be cited, but we deem it unnecessary to explore the field any further.

The case of *Doe v. Crafts*, *supra*, is cited by counsel for appellant, as sustaining his view of the question involved. In that case a judgment was recovered in 1846, upon a note dated in 1845. The judgment did not direct collection without appraisement. Property was sold without appraisement. The purchaser to show his title valid, offered to prove that the note on which the judgment was rendered was executed after the first day of *June*, 1848, and stipulated for a waiver of the appraisement laws. It was held that the evidence was inadmissible. That case is not at all in conflict with the conclusion arrived at in this, but harmonizes entirely with it.

If the facts offered to be proved were true and authorized a collection without appraisement, they made out such a case as entitled the plaintiff originally, by the express terms of the statute, to take judgment waiving appraisement, and he should have thus taken his judgment. We have seen, however, that in cases where notes were executed before the passage of the appraisement laws, there was no provision for taking such judgment.

There may be provisions in the code of 1852 that would authorize the rendition of judgments to be collected without

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appraisement, upon contracts entered into before the passage of our appraisement laws, and if so, it may be that upon judgments rendered after that code took effect, a sale could not be made without appraisement, unless it was so directed in the judgment. Upon this point we decide nothing, but allude to the code of 1852 for the purpose of saying that we pass upon no question that may arise under it.

We are of opinion that there was no error committed, hence the judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

James M. Hanna and Richard W. Thompson, for the appellant.

John P. Usher, for the appellee.

NOTE.—Judge *Hanna* did not participate in the decision of the above entitled cause, because he had been of counsel therein. This cause was decided on *May 27, 1862*, and a petition for a rehearing was thereafter filed, which was overruled in *January, 1863*, and the cause was, by mistake, omitted from 19 Ind. R.

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THE INDIANAPOLIS AND CINCINNATI RAILROAD CO. v. CLARK.

AMENDMENT.—On appeals from justices to the Common Pleas or Circuit Courts, it is competent for the latter Courts, under the code, § 97, to permit amendments to be made to the complaint, and to charge the party amending with the costs of the amendment only, unless the cause is delayed by reason of the amendment.

FORMER RECOVERY.—If the testimony offered in the second suit is sufficient to authorize a recovery, but could not have authorized a recovery in a former suit, the failure of the plaintiff in the former is no bar to their recovery in the second suit, although it is for the

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same cause of action for which they attempted to recover in the former suit. If the former suit, upon the trial of it, had a wider range than the pleadings in it indicated, such fact might, under appropriate issues, be shown by parol proof.

APPEAL from the *Ripley* Circuit Court.

WORDEN, J.—This was an action by *Clark* against the company for killing an ox on the road where it was not fenced. The suit was instituted before a justice of the peace and appealed to the Circuit Court, where, upon trial by the Court, there was a finding and judgment for the plaintiff. A demurrer to the complaint had been filed before the justice, and was by him overruled. In the Circuit Court the plaintiff, on leave obtained, amended his complaint by alleging that the ox was killed at a point on the road where it was not fenced. Thereupon the defendant moved the Court to tax against the plaintiff all the costs that had accrued in the case since the overruling of the demurrer by the justice, but this motion was overruled, and the Court taxed the plaintiff with the costs of the amendment merely. This ruling is complained of as erroneous. It does not appear that the trial of the cause was delayed by reason of the amendment, and in such case no other than the costs of leave to amend are to be taxed. Code, § 97. There was no error in this ruling.

On the trial, the defendant offered in evidence to show a former recovery, the transcript of a judgment of a justice of the peace, by which it appeared that, before the commencement of this suit, the plaintiff had instituted a suit against the defendant on the following cause of action, viz:

“*Richard Clark*, plaintiff, complains of the *Indianapolis and Cincinnati Railroad Company*, defendants, and says that the defendant is indebted to him in the sum of seventy dollars for an ox and two hogs, killed by the cars of said defendant

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in the month of *August* or *September*, 1859, of the value of 70 dollars, for which he demands judgment.

“RICHARD CLARK.”

The defendant appeared to the action, and on trial had, the justice, after hearing the evidence and argument of counsel, adjudged that the case be dismissed at the plaintiff's costs.

It appeared by the agreement of parties that the former suit was for the killing of the same ox, for the killing of which the present suit was brought. The question arises, whether the former suit is a bar to the present.

The complaint in the former suit seems to be based upon the common law liability of the defendant to pay for stock carelessly or negligently killed, and it may be doubtful whether it was sufficient for that, even before a justice of the peace, inasmuch as no carelessness or negligence was averred. It is clear enough that under that complaint the plaintiff could not have recovered on the statutory ground that the defendant was liable for stock killed on the road where it was not fenced, without reference to the question of negligence. In a suit based upon the statute the complaint must aver that the road was not fenced at the place, &c., and this rule is as applicable to suits before justices as in other courts. In the former suit before the justice, suppose the same facts had appeared that appear in the present, viz: that the ox in question was killed by the cars of the company at a point where the road was not fenced, no negligence being shown, and what would have been the result? The plaintiff must have gone out of Court, unless indeed he had got leave to amend his complaint, because the facts proven would not have sustained the cause of action he had attempted to make on paper. He attempted to state a common law cause of action, and his proof would have shown a different one altogether; one de-

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pending upon the statute, within the requirements of which the case as stated in the complaint did not come.

Now, the following point has been decided by this Court: "It is only where the same question has been determined that a former judgment is a bar. If the testimony offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiffs in the one suit is no bar to a recovery in the other, although it is for the same cause of action for which they attempted to recover on the first suit." *Kirkpatrick v. Stingley*, 2 Ind. 269; *vide*, also, to the same effect, note and references to American cases appended to the case of *Guest v. Warren*, 26 Eng. L. & E. R. 381; *Hargus v. Goodman*, 12 Ind. 629.

Applying this doctrine to the case before us, it is clear that the former judgment is no bar, because the evidence offered in this suit, although sufficient to sustain it, would not have sustained the former one for reasons above indicated.

It does not appear by the complaint in the former suit that any question was involved as to the liability of the company for killing the ox on account of their road not being fenced, but supposing that under the complaint such liability might have been drawn in question, whether it was so drawn in question was a matter of fact which might have been shown by parol proof, and the record showing no such proof, we can not presume that any such question was adjudicated in the former case. See *Hargus v. Goodman*, *supra*.

Per Curiam.—The judgment is affirmed, with costs.

John S. Scobey and *Will. Pound*, for the appellant.

Oscar B. Hord and *Cortez Ewing*, for the appellee.

NOTE.—Judge *Davison* did not participate in the decision of the above entitled cause, having been a stockholder in the company. The decision herein was rendered on the 29th of *January*, 1863, but was, by mistake, omitted from 19 Ind. R.

Hays et al. v. The Bank of the State.

HAYS *et al.* v. THE BANK OF THE STATE.

"EXCUSABLE NEGLIGENCE."—As an example of what will not constitute "excusable neglect," on an application to set aside a default, under § 99 of the code, the reader is referred to the opinion herein at length.

APPEAL from the *Dearborn* Circuit Court.

HANNA, J.—Suit on two bills of exchange, drawn by *Enoch Miller*, indorsed by *Job Miller*, and accepted by *Hays*. Service, on the last day on which service could be had, on *Miller* and *Miller*; judgment by default against them on the second day of the term. No service on, nor appearance then, by *Hays*. On the fifteenth day of the same term, the defendants appeared in Court, and moved to have the judgment and default set aside on the affidavits of *Hays* and *Enoch Miller*, and produced and offered to file their answers, and go to trial at the term. The motion was overruled, which presents the only point made by the appellants.

The affidavit of *Hays* stated that he was a resident of *Ohio*, and was not served, &c.; that the other defendants were the accommodation drawer and indorser of said bills, and he was to pay whatever sum was due thereon, which facts were known to the bank; that said bills were for money borrowed of the bank by said *Hays*, and were in renewal of others before then held by said bank, which had been at various times renewed, at, &c., usurious rates, &c., setting out facts; that a suit had been commenced in the Common Pleas Court, and, upon the filing of an answer, setting forth, &c., the President of the *Lawrenceburgh* branch, through which said loan was made, and affiant had agreed that said suit should be dismissed, because there was pending in, &c., an attachment proceeding against said *Job Miller*, in which it was expected eleven or twelve hundred dollars would be realized; that after said proceeding should be decided, they would adjust

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the balance, &c.; that said suit was dismissed, and he informed said *Miller* and *Miller* of said arrangement; that, at the commencement of this action, which was instituted by said President, &c., he was absent in *Illinois* on business, but said *Millers* immediately wrote to him, apprising him of the fact, and as soon as he could possibly leave his business, he returned home, but arrived after a default was taken, &c.; that said other defendants did not understand his defence, &c., having, as aforesaid, understood that said bills were arranged, did not make any defence; that he had no attorney, having, after the dismissal, as aforesaid, discharged his attorneys then employed; that he would have had an attorney to defend, &c., if he had not been deceived by said arrangement; that he offers to appear and file his answer, and try said case at the present term, &c.

The said *Enoch's* affidavit is similar to that of said *Hays*; and, in addition, he states that he and said *Job*, having no pecuniary interest in the suit commenced in the Common Pleas, left the defence to said *Hays*, and when this suit was begun, supposed in his absence his attorneys would defend the same; that they have a good defence, and, if they had known the attorneys formerly employed would not have continued in the defence, they would have employed attorneys, and prosecuted the same, &c.

We can not say that the ruling of the Court on said motion was not the exercise of a sound legal discretion.

The said *Millers* certainly neglected their interests in not fully informing themselves, upon the institution of this suit, whether there was any defence, and, if so, what and by whom it should be presented. This was especially their duty in the known absence of the person who, it is now said, really owed the debt. The nature of the defence they could have ascertained by an examination of the record of the former suit. The question as to whether the attorneys employed in that

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suit would present said defence in this, could have been ascertained from them as well as any information derived from *Hays*.

We can not, therefore, say that such a degree of diligence was used, as should bring this within the term, "excusable neglect," as to said *Millers*, so as to authorize the Court to grant the relief prayed. As to *Hays*, he can make his defence when the bank presses the suit against him.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

D. S. Major, for the appellants.

McDonald & Roache, for the appellees.

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133	6
21	156
134	430

21	156
170	246

PRESTON et al. v. SANDFORD'S Administrator.

PRACTICE IN SUPREME COURT—WAIVER.—This Court will not reverse a judgment, in a valid cause for any error in the proceedings below, which was waived by the party against whom it was committed.

WAIVER—ESTOPPEL.—Where, in the progress of a cause, errors intervene, to which the party, against whom they are committed, has an opportunity to object, and he neglects to do so when they occur, or upon the trial, in any appropriate manner, such neglect will operate as a waiver thereof, and will estop him thereafter to avail himself of any objection based upon such errors.

APPEAL from the *Knox* Circuit Court.

PERKINS, J.—In *February*, 1862, *Preston* and others filed a complaint in the *Knox* Circuit Court for the foreclosure of a mortgage against *Sandford* and others. The mortgage was executed, as was the note secured by it, by *George Sandford*;

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but he had deceased before the suit for foreclosure was commenced, and, hence, it was instituted against *Richmond Sandford*, the devisee, and *Lance Hall*, administrator of said *George Sandford's* estate, and *Frederick W. Vehie*, a purchaser of the equity of redemption of *George Sandford*.

The defendants answered as follows:

Vehie admitted the complaint.

Lance Hall and *Richmond Sandford* answered jointly in two paragraphs, setting up payment of the note and mortgage.

This answer seems to have been demurred out. *Lance Hall* afterwards answered separately, in two paragraphs, setting up fraud and payment. There was a reply, denying the answer of payment, and a demurrer sustained to the paragraph setting up fraud. At this stage of the case, *Hall* died, and *Horace B. Shepherd*, administrator *de bonis non*, of *George Sandford's* estate, was substituted as defendant in his stead, and the cause continued for process upon *Shepherd*, which was served. At the next term, a rule was taken upon the defendants for an answer. There had been demurrers, amendments, refile of pleadings, &c., and the record is somewhat confused in relation to the issues. No exceptions, however, it should be stated, were taken by either party in the progress of the cause. The next entry of record is as follows:

"Come the parties by their attorneys, and, the issues being joined, by agreement of the parties, a jury is waived, and the cause being submitted to the Court for trial, the Court finds the facts," &c.

A judgment of foreclosure and sale was rendered, and that the surplus money, if any, be paid to *Vehie*, the purchaser of the equity of redemption. No exception was taken by any one to any part of the judgment, nor to any step taken in the cause. Subsequently, the mortgaged premises were sold, pursuant to the judgment of foreclosure, to *William Buscher*. Afterwards, a suit for review of the judgment was instituted

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for errors alleged to be apparent upon the face of the record, viz:

1. *Shepherd*, the administrator *de bonis non*, was not regularly made a party.

2. The defendants' answer was not replied to, and, hence, being new matter in avoidance, was necessarily taken as true, and entitled the defendants to judgment.

3. The surplus money should not have been adjudged to *Vehie*.

The first assigned error is not insisted on in the brief of counsel. The second raises the main question.

It is claimed that there was a trial without an issue. Concede the fact, for the purposes of this case, and what must follow?

We think we may safely lay down the proposition, that no Court of review will reverse a judgment, in a valid cause, for an error in the proceedings, which was waived by the party against whom the error was committed. Such a party is estopped to assert the error. As to him, indeed, it is not error. His waiver takes away, as to him, the quality of error in the proceeding. It is the province of Courts of error and review to relieve a party injured from the consequences of erroneous rulings of the *nisi prius* Courts, made against the party's consent, and over his objection.

But how must this waiver, by the party to a ruling below, appear? It need not be entered formally upon the record. It appears by the absence of any objection and exception. Where a party is in Court, it is held, that "every failure to assert a legal right, at the proper time, [during the progress of a cause,] is a waiver of that right." *Zehner v. Beard*, 8 Ind. 96. "In *The Commonwealth v. Sowell*, 9 Met. 572, the Court say, in reference to an erroneous ruling on the trial below, that, as the defendant had an opportunity, but failed to avail himself of it on the trial, of making his objections, his

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acquiescence was a waiver, and estopped him to raise it afterwards." *McCorkle v. The State*, 14 Ind. 89. To the same effect, *Hornburger v. The State*, 5 Ind. 300; *Stump v. Fraley*, 7 Ind. 679; *The State v. Swartz*, 9 Ind. 222; *Kent v. Lawson*, 12 Ind. 675, 678; *Vance v. Cowing*, 13 Ind. 460, 462; *Martindale v. Price*, 14 Ind. 115; *The State v. Manly*, 15 Ind. 8; *Hindman v. Troxall*, *id.* 123; *Henley v. Kerr*, *id.* 391; *Knowlton v. Murdock*, 17 Ind. 487; *Davis v. Engler*, 18 Ind. 312; *Nelson v. Johnson*, *id.* 330, 333. The last case, *Nelson v. Johnson*, not only carries out the rule, but applies it to a complaint for review. See *Ingersoll v. Bostwick*, 22 N. Y. Rep. 425.

Applying, now, this doctrine to the case at bar, when the defendant had put in his affirmative answers, containing matter of avoidance, he was entitled to his rule for a reply; and, on a failure of the plaintiff to comply with it, he might have craved judgment against him, taking his answers, as admitted, to be true. He was not bound to go to trial till issue was formed; but he consented to; he waived the reply, the preliminary step to a trial, and consented to treat the answers as untrue, though not denied, and to go to the proof of them as though denied. A trial was had accordingly, and resulted adversely to the defendant. All this appears of record. Hence, upon the record, as it stands, the defendant is not entitled to judgment. Such is the settled practice under the code, on appeals to the Supreme Court. *Martindale v. Price*, 14 Ind. 115; *Henly v. Kerr*, 15 Ind. 391; *Knowlton v. Murdock*, 17 Ind. 487; *Davis v. Engler*, 18 Ind. 312.

It would be impolitic to allow a party to consent to go to trial upon a given state of the record, take his chance of success upon it, and, failing, to then turn round, repudiate his own voluntary act, and thus defeat his opponent under all circumstances. There is nothing in the opinion in *Ely v. Hawkins*, 15 Ind. 230, in conflict with the view we have taken.

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And if a party is not allowed to claim as errors, on appeal, any irregularity in the proceedings which he consented to, how can he be allowed such a claim in a suit for review for those irregularities which, as to him, are not errors? See *Ind. Mut. Ins. Co. v. Routledge*, 7 Ind. 28. Also, *Foot v. Le-favour*, 6 Ind. 473.

Another point: As a proposition of law, we take it that the equity of redemption of real estate goes to the heir, to a purchaser who buys it at a legal sheriff's sale, and to a devisee. It may be taken, by proper proceedings, from an heir or devisee, to be made assets for the payment of debts. See *Newkirk v. Burson et al.*, ante, page 129.

There being no error in the original judgment, for which it could be reversed, it is not, as we understand, claimed that there is any ground for setting aside the sale which took place under it. It may be observed, that the party might have moved for a new trial, and, on that motion, shown his excuse for going to trial without an issue, and that he had not thereby waived what was clearly an error otherwise.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded.

Judah & Veihe, for the appellants.

John Baker, for the appellee.

STRUCKMAN v. THE STATE.

CRIMINAL LAW AND PRACTICE.—In an information for retailing intoxicating liquors, it is not sufficient to aver that the defendant, on, &c., at, &c., "did sell for five cents to one B one gill of intoxicating liquors," without license, &c., but it should affirmatively appear that the quantity sold was less than one quart.

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OVERRULED CASES.—The case of *Willard v. The State*, 4 Ind. 407, so far as it is inconsistent with the decision herein, is overruled.

APPEAL from the *Bartholomew* Common Pleas.

WORDEN, J.—Information against the appellant for retailing without license. Motion to quash overruled, trial, conviction and judgment.

The information charges that the defendant, on, &c., at, &c., “did sell for five cents to one *Frederick Brockmeyer* one gill of intoxicating liquors,” not being licensed, &c.

The principal objection to the information is that, it does not allege that the quantity sold was less than a quart. The statute prohibits the sale, without license, of any intoxicating liquors by a less quantity than a quart at a time; also, the sale, without license, of any such liquors (in any quantity) to be drunk on the premises. Acts 1859, p. 202. Is the information sufficient? It neither alleges that the quantity sold was less than a quart, nor that it was to be drunk on the interdicted premises. It simply charges the sale of one gill. It is undoubtedly true that Courts and juries may legally take notice of known and established measures of quantity; they may notice that a gill is a quantity less than a quart. But does the allegation bring the defendant within the prohibition? We think not. The gill sold may have been but part of a larger quantity, a quart or more. Suppose the defendant sold a quart, which he had a right to do without license, it would be true that he sold a gill, it would be true that he did just what the information charges him with doing. In the case of *Commonwealth v. Odlin*, 23 Pick. 275, the indictment charges the defendant with selling “one pint of spirituous liquors,” under a statute that prohibited the sale of less than fifteen gallons. The indictment was held bad. The following remarks of the Court in that case are equally applicable here: “It seems to be a settled rule of law that where an

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act is made penal, with certain exceptions and limitations embraced in the same clause of the statute, so as to be descriptive of the offense intended to be punished, it is necessary to state in the indictment that the act was done, and to negative those exceptions and qualifications, and that the precise statute offence can not otherwise be described and specified. As a mode of applying this rule, a test is often given thus: if all the facts alleged in the indictment may be true, and yet the defendant not guilty, the indictment is insufficient. This plain reason may be assigned for it, that a verdict does nothing more than verify the facts charged; and if these do not show the party guilty, he can not be considered as having violated the statute. To apply these rules this Court alleges affirmatively that the defendant did sell one pint," &c. * * * If fifteen gallons were sold it would be true that one and many pints were sold. But the indictment should aver that that pint was not part of a larger quantity, and all carried away at one and the same time, and then it would allege a violation of the law. We do not consider that any particular form of words must be adopted, but some words must be used which do convey to the mind the idea of a sale under fifteen gallons. Were it said, "less than fifteen gallons, to-wit: one pint," or "one pint and no more," or words equivalent, it would be sufficient. But simply averring affirmatively that the defendant did sell one pint, without some words negating a larger quantity, is not bringing the case within the statute."

We are aware that in *Willard v. The State*, 4 Ind. 407, an indictment which charged that the defendant "unlawfully bartered and sold one pint of spirituous liquors," &c., was held sufficient. But we think it more in accordance with the well established principles of criminal pleading to hold that some further allegation is necessary to show that the quantity sold was less than the quantity named in the statute.

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The information, in our opinion, was defective and should have been quashed.

Per Curiam.—The judgment below is reversed.

Francis T. Hord, for the appellant.

Oscar B. Hord, Attorney General, for the State.

RUDDICK'S Adm'r v. RUDDICK'S Adm'r.

PRACTICE—NEW TRIAL.—Where a party asks for a new trial on the ground of newly discovered evidence, he must set forth in his bill of exceptions the testimony which was submitted below, so as to enable the Court to determine whether the result would be changed by the new testimony, or whether the testimony would be merely cumulative.

APPEAL from the *Jackson* Common Pleas.

PERKINS, J.—There was suit in the *Jackson* Common Pleas. The plaintiff in that suit recovered a thousand dollars. The defendant made a motion for a new trial, which was overruled. The motion was based upon alleged newly discovered evidence.

After the trial, but within a year thereafter, the defendant filed his petition for a new trial on account of additional newly discovered evidence. The Court sustained a demurrer to the petition, and refused the new trial. The evidence heard on the original trial is not placed before this Court. How, therefore, can this Court say whether there ought to be a new trial or not? If the newly discovered evidence is merely cumulative, or would not change the result of the former trial, there ought not to be a new trial. How can this Court, while in ignorance of the evidence given on the former trial,

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say what, in connection with that evidence, might be the effect of the newly discovered evidence, upon another trial. See the cases collected in Davis' Dig. p. 627. Also, *Cox v. Hutchings*, and *Glidewell v. Daggy*, at this term.

Per Curiam.—The judgment is affirmed, with costs.

J. J. Cummings, for the appellants.

R. Crawford, for the appellee.

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COX v. VANDERKLEED.

DAMAGES.—In action for civil damages for an assault and battery, the jury, in assessing the damages, may consider the injury inflicted on the plaintiff by the blow given by the defendant, the expense incurred, loss of time, of hearing, of his peace of mind and individual happiness occasioned by the injury received.

APPEAL from the *Tippecanoe* Circuit Court.

WORDEN, J.—This was an action by the appellee against the appellant for assault and battery. Trial, verdict and judgment for the plaintiff.

The case is before us on the evidence, and an instruction to the jury. We can not disturb the verdict on the evidence, nor do the damages clearly appear to have been excessive. The instruction complained of is as follows: "In assessing damages you may consider the injuries inflicted on the plaintiff by the blow given by the defendant, the expenses incurred, loss of time and hearing, also his peace of mind and individual happiness occasioned by the injury received." This instruction is sustained by the case of *Taber v. Hutson*, 5 Ind. 322, and it seems to us to be correct in principle. Nor can we say that it was not applicable and pertinent to the evidence.

Jones v. Jones' Adm'rs.

Per Curiam.—The judgment below is affirmed, with costs and 1 per cent. damages.

D. Mace and *W. C. Wilson*, for the appellant.

H. W. Chase and *J. A. Wilstach*, for the appellee.

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The ruling herein relates chiefly to the sufficiency of evidence, and the reader is referred thereto at length.

APPEAL from the *Franklin* Circuit Court.

DAVISON, J.—The appellant, who was the plaintiff, brought an action against the appellees, alleging in his complaint that one *James Jones*, on the 1st of *September*, 1849, died, leaving a will, whereby he devised to said *Daniel D. Jones*, his son, the plantation on which he, the testator, then lived, containing 266 acres, reserving one-third of the rents, issues and profits thereof to his wife, *Mary Jones*, during her natural life; which rents, &c., she received until the 1st of *November*, 1854, when *Daniel D. Jones*, the devisee, sold the land to the plaintiff for 7,350 dollars, for which sum the plaintiff gave his notes, as follows: one note for 1,350 dollars, payable on the 1st of *January*, 1855, and six other notes for 1,000 dollars each, payable in one, two, three, four, five and six years from the first of *January*, 1855, with interest, &c.; that at the time of the sale it was agreed between the parties that in consideration that the plaintiff would accept a quit claim deed for the land, with the incumbrance aforesaid, and would furnish support and maintenance to said *Mary Jones* to the amount of 100 dollars per year, during her natural life, that

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he, *Daniel D. Jones*, would pay to the plaintiff 100 dollars per year during her life, or credit 100 dollars on said notes for each and every year she might live. And the plaintiff avers that he did take a quit claim deed for said land, and did furnish support and maintenance for said *Mary* to the amount of 100 dollars for each and every year from the day of the sale of the land up to the filing of this complaint, amounting, in the whole, to 600 dollars, besides interest, and that he still supports and maintains her. But the plaintiff says that *Daniel D. Jones*, while in life, did not pay, nor have his administrators since his death paid, the 100 dollars per year, in accordance with his agreement, or any part thereof. Nor has he, nor have they, credited the same or any part thereof, on said notes or either of them, &c.

Defendant answered: 1. By a denial. 2. That the supposed undertaking of *Daniel D. Jones*, their intestate, as alleged, was not in writing, and was not to be performed within one year, and is, therefore, void by the statute of frauds, &c. 8. That six years has elapsed since the promise, &c., was made, and that the same was not in writing. Plaintiff, as to the second and third paragraphs of the answer, replied by a denial. And further, as to the second, he replied specially as follows: "That the promise and undertaking alleged, &c., was to be performed, by the intestate, by the payment of 100 dollars to the plaintiff for each and every year during the lifetime of *Mary Jones*, as stated in the complaint, and plaintiff admits that the contract was not in writing, &c." Defendants demurred to this special reply, but the demurrer was overruled and they excepted. Verdict for the defendants; motion for a new trial refused and judgment, &c.

The errors assigned are: 1. The verdict is contrary to law. 2. It is unsustained by the evidence.

The appellant contends that the verdict is contrary to law, because the contract, as set up in the complaint, is not void

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by the statute of frauds. We are unable to perceive the force of this argument. The Court, on its ruling upon the demurrer to the reply to the second defence, decided the point on which the appellant now relies in his favor, namely: that the contract set up, &c., was not within the statute. And hence the jury, for aught that appears in the record before us, had nothing to do with the law arising upon the averments in the pleadings to which we have referred. It was simply their province to determine whether the facts therein alleged were proved by the evidence. Indeed the only question in the case relates to the sufficiency of the evidence. We have examined it carefully and, though it is to some extent conflicting, we are of opinion that its weight sustains the verdict.

Per Curiam.—The judgment is affirmed, with costs.

J. M. Johnson, for the appellant.

W. Morrow, for the appellees.

BENDER v. SHERWOOD.

NEW TRIAL UNDER ART. XXIX.—Where *A* made a mortgage to secure a loan of money from the Trust Funds, and, after several transfers of the mortgaged property, the auditor, to collect the mortgage debt, advertised and sold the property in the name of the mortgagor, and *B* became the purchaser on a credit of a few days, and, before the purchaser money was paid, the owner of the fee at the time of the sale offered to pay the debt and interest, which was refused by the auditor, and the owner then sued to enjoin the execution of a deed to *B* and to set aside the sale, and had judgment upon the trial, and *B* then demanded a new trial as of right, under

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article XXIX of the Code, (2 G. & H. 281) which was refused by the Court.

Held, that the new trial should have been granted.

APPEAL from the *Fountain* Circuit Court.

HANNA, J.—This was an application by the appellee to enjoin the appellant, as purchaser, from taking possession of a certain described lot of land, as well as to prevent one *Webb* from executing a deed therefor. Injunction granted. There was an application for a new trial as a matter of right, overruled.

It is averred that the lot was mortgaged to certain of the trust funds, and irregularly sold by *Webb*, the auditor of the county, specifically setting out the facts; that it was purchased at said sale by appellant, &c.

The question we are asked to decide is, whether the appellant was entitled to the new trial under section 601, p. 167, 2 R. S. 1852.

It appears to us that if the purchaser at said sale acquired a valid title, the injunction should have been refused, and, therefore, the conflicting claims to the said property were to such a degree involved in the suit and determination as to bring the case within the statute referred to.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

Tipton & Davidson, for the appellant.

Brown & Park, for the appellee.

Shipley v. Patton's Administrator.

SHIPLEY v. PATTON's Administrator.

STATUTE OF FRAUDS—CONTRACT.—A contract whereby *A* sold a horse to *B*, and warranted that it should be sound for one year thereafter, and agreed, that, if, after the expiration of one year, the horse should prove unsound, he would take it back and pay the plaintiff 100 dollars, is within the statute of frauds, and not operative against *A*, unless in writing. 1 G. & H. 348, 5th subsection of sec. 1.

APPEAL from the *Morgan* Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellee.

The action was brought upon an agreement entered into between the plaintiff and the deceased. The following special finding of the facts by the Court fully presents the question involved:

“That on the 24th day of *January*, 1860, the defendant sold the plaintiff a horse, which he (defendant) warranted should be sound for one year thereafter, and that, if, after the expiration of one year thereafter, said horse should prove unsound, he (defendant) was to take him back, and pay the plaintiff 100 dollars; that at the expiration of one year thereafter, said horse proved to be unsound, and is yet unsound, and that on the 27th day of *January*, 1861, the plaintiff tendered back to the defendant said horse, and demanded 100 dollars for the breach of said warranty, which said sum of 100 dollars is wholly unpaid.”

On this finding the Court rendered judgment for the defendant, regarding the contract as within the statute of frauds.

That the ruling was correct, we have no doubt. The contract, by its terms, was not to be performed until after the expiration of one year from the making thereof. In case of the unsoundness of the horse, he was not to be returned, nor was the 100 dollars to be paid until after the expiration of a

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year. Nor was the contract fully executed on either side, nor was it to be thus executed, within the year. The plaintiff had something to do in order to entitle himself to recover, viz: he had to return the horse. This, however, was not to be done until after the expiration of a year. That it was necessary for the plaintiff to return the horse, or offer to return him, in order to a recovery, is apparent from the consideration that he might choose to retain him, notwithstanding his unsoundness. That the contract was within the statute of frauds, seems to be fully established by the case of *Wilson v. Ray*, 13 Ind. 1, and authorities there cited.

Per Curiam.—The judgment below is affirmed, with costs.

W. R. Harrison, for the appellant.¹

J. S. Hester, *F. P. A. Phelps* and *B. K. Elliott*, for the appellee.²

(1) The counsel for the appellant argues: The statute of frauds applies only to contracts, which, by the express stipulations of the parties, are not to be performed within a year, and does not apply to agreements formed or based upon a past or executed consideration. *Wiggins v. Kiger*, 6 Ind. 252; *Wilson v. Ray*, 13 *id.* 1; Brown on Stat. of Frauds, sec. 287; *Donnellan v. Read*, 3 Barn. & Adolph. 899; 2 Parsons on Cont. 316, and N. J.; *Moore v. Fox*, 10 Johns. 244.

(2) The counsel for the appellee urge: By the express terms of the contract, as found by the Court, it falls clearly within the operation of the 5th subsection of sec. 1 of the statute of frauds. (1 G. & H. 348.) *Wilson v. Ray*, 13 Ind. 1; *Lower v. Winters*, 7 Cowen 263; 10 Johns. 214; 1 Salk. 280; Skin. 353; Holt 326; 3 Burr 1278; 1 Bl. 353; 1 Com. on Contr. 87; *Lapham v. Whipple*, 8 Met. 59; *Holloway v. Brompton*, 4 B. Mon. 415; *Tuttle v. Sweet*, 31 Maine 555; Brown on Stat. of Frauds, sec. 285.

The State ex rel. Lockhart v. Mason et al.

JACKSON v. THE STATE.

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CRIMINAL LAW AND PRACTICE.—The record, on appeal in a criminal case upon indictment, should show that a grand jury was duly empannelled, and that the indictment was duly found by such jury, and returned by them into Court.

APPEAL from the *Grant* Circuit Court.

Per Curiam.—Indictment for retailing. Motion to quash overruled. Trial, conviction, and judgment over a motion in arrest.

It does not appear that any grand jury was empannelled, or that the indictment was found and returned into Court by a grand jury.

The judgment below is reversed.

N. W. Gordon and *H. D. Thompson*, for the appellant.

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EXECUTORS AND ADMINISTRATORS—WIDOW.—*A* executed a mortgage on his land to *B*, in which his wife joined, to secure the payment of a debt. *A* died since the taking effect of the code of 1852, his wife him surviving, and said debt remaining unpaid. *C* became administrator of his estate, and there came into his hands, as such, assets sufficient to pay the expenses of administration, the expenses of the intestate's last illness, and funeral expenses, and said mortgage debt. But he failed to pay the mortgage debt, and suffered the mortgage to be foreclosed, and the property to be sold to pay said debt, and applied said assets to the payment of other debts not liens on the real estate.

Held, 1. That it was the duty of the administrator to pay said mort-

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gage debt out of said assets, and that his neglect to do so constituted a breach of his official bond.

2. That the widow of *A* had a right to have said assets applied in payment of said debt before the payment of general debts, and was damaged by the failure of the administrator so to apply it, and for such damage, she had a right of action against him and his sureties on his official bond.
3. That, so far as a widow takes by descent from her husband, under the provisions of chapter 46, 1 G. & H. 291, she takes also as his heir, and, therefore, she may, under sec. 162, 2 G. & H. 529, maintain an action against an executor or administrator on his bond.

APPEAL from the *Martin* Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellees, upon an administration bond, executed by *Edwin B. Mason* and his sureties, as administrator of the estate of *William Chutts*, deceased. Demurrer to the complaint sustained, and judgment for defendants.

Mrs. Lockhart was the widow of *Chutts*, deceased, having since intermarried with *John H. Lockhart*. The complaint alleges, in substance, that, prior to the death of said *William Chutts*, he executed a mortgage on certain real property, described, which he then owned, to one *Sims*, to secure the payment of 300 dollars; that his wife, now *Mrs. Lockhart*, joined in the mortgage, which remained unpaid at the death of the decedent; that there came into the hands of said administrator assets in money to the amount of over 1,200 dollars, more than enough to pay the expenses of administration, the expenses of last sickness, and funeral expenses, and the said mortgage debt; that subsequently, to-wit: in *July*, 1861, the mortgage was foreclosed, and the premises sold to satisfy said debt, whereby the interest of *Mrs. Lockhart*, in the premises mortgaged, was foreclosed and barred; that *Mason*, although he had the money in his hands, wherewith to pay said debt, and although it was his duty to pay the same, failed and re-

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fused to make such payment, and suffered the foreclosure of the mortgage, and the sale of the premises; but that, on the contrary, he applied 600 dollars of said assets to the payment of debts not liens upon the real estate of the deceased, and the residue thereof he converted to his own use.

We are of opinion, that the facts alleged constitute a breach of the administration bond, for which the widow of the deceased is entitled to maintain an action. She had a right to have the funds applied, after paying expenses of administration, and the funeral expenses, and the expenses of last sickness, to the payment of this debt, before the payment of general debts, because the statute makes it the duty of the administrator to make such payment. 2 R. S. 1852, p. 273. Nor are the damages, sustained by the widow, too remote; they are the direct and immediate consequence of the administrator's breach of duty. She was entitled, as we have seen, to have the mortgage paid out of the assets in the hands of the administrator; and by his failure to make such payment, the mortgaged premises have been sold, and she has lost her interest therein.

But, it is insisted, that the widow does not come within any of the classes of persons authorized by statute, to sue upon an administrator's bond. Such suit may be brought by any "creditor, heir, legatee," &c. 2 R. S. 1852, p. 285, sec. 162. By the 17th section of the act regulating descents, &c., 2 R. S. 1852, p. 250, it is provided, under certain limitations, that, upon a man's death, one-third of his realty shall descend to his widow; by the 23d section, one-half, under certain circumstances, descends to her. So there are other provisions of the law casting the descent upon the widow. Now, it seems to us, that, so far as the widow takes by descent from her husband, she must take as his heir. It is undoubtedly competent for the Legislature to determine, upon the death of a person, upon whom the descent of his

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property shall be cast; that is to say, who shall be his legal heirs. In the case before us, the widow took as heir to her husband, by force of the statute, a portion of the property mortgaged, and she comes fully within the spirit of the statute authorizing an heir to sue the administrator on his bond for a breach of his duty. This view is sustained by what was said by this Court in the cases of *Frantz v. Harrow*, 18 Ind. 507; *Thomas v. Thomas*, 18 Ind. 9, and *Johnson v. Lybrook*, 16 Ind. 473. The demurrer to the complaint should have been overruled.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

John Baker, for the appellants.

W. E. Niblack, for the appellees.

URBAN v. KRAIGG.

PRACTICE.—An application for a new trial on the ground of the misconduct of the jury, must be sustained by an affidavit showing its truth.

APPEAL from the *Hamilton* Common Pleas.

Per Curiam.—This was an action by the appellee, who was the plaintiff, against *Urban*, to recover damages for pulling down and removing a fence. The issues were submitted to a jury, who found for the plaintiff. New trial refused and judgment. The causes for a new trial are thus assigned:

1. The verdict is unsustained by the evidence.
2. Misconduct of the jury, in this, to-wit: that one of the jurors, during the whole time of the argument, was engaged in reading a newspaper.

As the evidence is not in the record, the first alleged cause

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is not available. And the second is also unavailing, for the reason that it does not appear to have been supported by an affidavit showing its truth. 2 R. S. (G. & H.) pp. 212, 215, §§ 352, 355.

The judgment is affirmed, with 5 per cent. damages and costs.

J. N. Evans, for the appellant.

HUGHES v. THE LAKE ERIE AND PACIFIC R. R. CO.

JURISDICTION—RAILROADS.—The Circuit Court and Courts of Common Pleas have concurrent jurisdiction in actions for the assessment of damages for lands taken by railroad companies, and where proceedings for such purpose have been commenced in one of said Courts, and appraisers appointed thereby, and an award made and returned by them, the other Court can not then deprive it of jurisdiction.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—On the 10th of *November*, 1862, the *Lake Erie and Pacific Railroad Company* filed, in the office of the Clerk of the *Wayne* Common Pleas, an appropriation of a parcel of the land of *Evan Hughes*, for the track of her railroad. Afterwards, the Judge of said Common Pleas appointed appraisers to determine and report the value of the land appropriated. *Hughes* was present by attorney at the appointment of appraisers. Afterwards, on the 12th day of *December*, 1862, the appraisers filed their award in the office of the Clerk of the *Wayne* Common Pleas. At the next term of the *Wayne* Circuit Court, *Hughes*, by his attorneys, claimed to have the award reviewed in that Court upon exceptions previously filed with the Clerk. The Circuit Court refused to take jurisdiction.

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There are two statutes for the assessment of damages in cases like the present. Both give concurrent jurisdiction to the Circuit and Common Pleas Courts, and in a proceeding in either, the owner of the land is entitled to a jury trial in such Court before final judgment. *The Lake Erie, &c., Co. v. Heath*, 9 Ind. 558. The statutes are found, one in 1 G. & H. p. 509; the other in 2 G. & H. p. 815. The proceeding in this case was instituted under the former of the two statutes; and having been commenced in the Common Pleas, that is, the appropriation having been filed in that Court, the appraisers appointed by it, and the award having been returned to that Court, the jurisdiction of that Court attached, of which the Circuit Court could not, by attempting to assume jurisdiction, deprive it. The ruling of the Court below was right.

Per Curiam.—The judgment is affirmed, with costs.

Lafe Develin and George A. Johnson, for the appellant.

N. H. Johnson and W. S. Ballenger, for the appellee.

THE STATE v. HAYS.

"BANK BILLS"—"BANK NOTES."—The terms, "bank bills" and "bank notes," are synonymous in their popular sense, and, under §§ 58 and 59, 2 G. & H. 403, they must be held to be identical in their legal signification.

CRIMINAL LAW AND PRACTICE.—An indictment which describes the property stolen as "three bank bills of the description and denomination following, viz: one five dollar bank bill on the *Hartford Bank of Connecticut*, of the value of five dollars," &c., is sufficient as to the description of the property.

APPEAL from the *Wabash* Circuit Court.

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that the word note is not used in this section, and yet it designates a bill "payable to bearer," in such language as plainly makes it descriptive of the instrument proposed as evidence in this case. And, so far as we are advised, the words, "bank bill" and "bank note," in their popular sense, are used to designate the same identical thing. That being the case, the Court, in its refusal to admit the evidence, committed an error.

Per Curiam.—The appeal is sustained.

Oscar B. Hord, Attorney General, and *T. C. Whitesides*, Prosecuting Attorney, for the State.

NILL et al. v. BROOKS.

PLEADING.—When a pleading is founded on a written instrument, the original or a copy must be filed with it.

APPEAL from the *Allen* Common Pleas.

DAVISON, J.—*Brooks* sued *Nill* and *Sturgis* for the recovery of certain articles of personal property. The complaint is in the usual form. The defendants answered:

1. By a denial.
2. That the property was, by them, legally purchased of one *Daniel Croucher*, the owner of it, who delivered possession thereof to the defendants.
3. That *George Nill*, one of the defendants, became security for *Croucher* in the purchase of, and for, the same property described in the complaint. And to induce *Nill* to become such surety, *Croucher* agreed to give a mortgage thereon, to secure *Nill* in such suretyship; and, in pursuance of said agreement, *Croucher* did then and there deliver to *Nill* a mortgage, as

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agreed on. But by mistake of the parties, the property, in the complaint described, was omitted. It is averred that the plaintiff, with a full knowledge of these facts, and with intent to defraud *Nill*, obtained from *Croucher* a mortgage on said property, and, by virtue of it, claims possession, &c.

To the second paragraph there was a reply; but to the third there was a demurrer, which was sustained. The issues were submitted to a jury, who found for the plaintiff, and assessed his damage at 180 dollars, the value of the property, &c. New trial refused, and judgment, &c. The errors assigned, so far as relied on in the appellants' brief, are:

1. The sustaining of the demurrer.
2. The insufficiency of the evidence to sustain the verdict.

The defence demurred to, as we understand it, sets up a mortgage of the property in dispute, executed by *Croucher* to *Nill*, one of the defendants, prior to the date of the title relied on by the plaintiff. But the mortgage, thus set up, does not appear to have been filed with the pleading. Nor is there any averment that it was so filed. The defence, therefore, must be adjudged defective. 2 R. S. p. 44, sec. 78; 13 Ind. 58, 146. We have looked into the evidence, and are of opinion that it fully sustains the verdict.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Jenkinson & Smith, for the appellants.

CORNELL v. GOODRICH et al.

PLEADING—LIMITATIONS.—Suit to test the validity of a will. The complaint avers, amongst other things, the following facts: The will

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was admitted to probate before the Clerk on *August* 30, 1854, and, on *May* 6, 1857, the present plaintiff, one of the heirs of the testator, sued in the *Shelby* Circuit Court to annul the will and the probate thereof, making the other heirs and devisees defendants, and alleging sufficient grounds to invalidate said will, and on a trial in said Court, the will was adjudged to be void, and the probate thereof was set aside. The defendants appealed to the Supreme Court, and said judgment was reversed by said Court, on *November* 19, 1860, on the ground that the *Shelby* Circuit Court had no jurisdiction to adjudge said will and probate invalid, and, on *February* 18, 1861, this action was commenced in the *Shelby* Common Pleas, for the same purpose, against the same defendants, and praying for the same relief, upon the same grounds, and alleging that the plaintiff was, at the death of the testator, and at all times since has been, and now is, a resident citizen of the State of *Ohio*, and at no time, since said death, has been a resident citizen of the State of *Indiana*.

Held, That the complaint was good on demurrer, and that, under § 47, 2 G. & H. 561, the plaintiffs' right of action was not barred by the lapse of time.

APPEAL from the *Johnson* Common Pleas.

DAVISON, J.—This was a proceeding, under the statute, to contest the validity of the will of one *Andrew Cornell*, deceased. Demurrer to the complaint sustained, and final judgment given, &c.

The only question to settle is, whether the complaint, on its face, shows that the proceeding is barred by the statute of limitations?

The facts alleged in that pleading, so far as they relate to the question to be considered, are as follows:

The will, it appears, was offered for, and admitted to, probate on the 30th of *August*, 1854, before the Clerk of the *Shelby* Common Pleas, and, on *May* the 6th, 1857, the present appellant commenced an action in the *Shelby* Circuit Court, to annul the said supposed will and the probate there-

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of, making the present appellees parties defendants, and alleging the same objections to its validity, as herein alleged. It is averred that said defendants appeared, and made defence to the action in the *Shelby* Circuit Court, and that the proceedings in that action resulted in a verdict and judgment, setting aside the will and probate; from which judgment, the then defendants appealed to the Supreme Court, and which Court afterwards, on the 19th of *November*, 1860, and while in session, reversed said judgment, on the ground, and for the cause, that the *Shelby* Circuit Court had no jurisdiction to adjudge said will and probate invalid, and that this suit was commenced within one year after the aforesaid reversal, to-wit: on the 18th of *February*, 1861; and, further, it is averred, that *Thornton Cornell*—the appellant—who was the plaintiff below, was, at the death of *Andrew Cornell*, the testator, and at all times since has been, and now is, a resident citizen of the State of *Ohio*, and at no time, since said death, has been a resident or citizen of this State.

Upon these facts, it is insisted, that this suit is barred by the statute of limitations. Is the position, thus assumed, correct? An act, relative to the contestation and probate of wills, provides, sec. 39, that “any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate.” And sec. 47, of the same statute, enacts, that “infants, persons absent from the State, or of unsound mind, shall have two years, after their disabilities are removed, to contest the validity or due execution of such will.” 2 Rev. Stat. pp. 317, 319. And by sec. 218, p. 77, of the same revision, it is provided, that “if, after the commencement of an action, the plaintiff fail therein from any cause, except negligence in the prosecution, or the action shall abate or be defeated by the death of a party, or judgment be arrested, or reversed on appeal, a new action may be brought within five

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years after such determination, and be deemed a continuation of the first for the purposes herein contemplated."

These provisions are cited and relied on by the appellant. Do they, when applied to the alleged facts, exclude the operation of the statute? As we have seen, the averment is, that the plaintiff was, at the death of the testator, and at all times since, a resident citizen of *Ohio*, "and was at no time, since said death, a resident or citizen of this State." This, it seems to us, was sufficient to show, *prima facie*, an absence from the State, at the time, and at all times since, the will was offered for probate. It is true, the plaintiff, on the 6th of *May*, 1857, instituted a suit in the *Shelby* Circuit Court to contest the validity of this will; but that does not necessarily involve the fact that he was then in the State. And the complaint being silent as to whether he was or not within the State, we are inclined to hold that the statute did not commence running against him at a period sufficient to bar the present action. *Hall v. Little*, 14 Mass. 203.

We think, however, that sec. 218, above recited, does not apply to the case made by the complaint; because it is contained in an article of the code, which relates generally to the "limitation of civil actions," and which provides, that "all actions not limited by any other statute, shall be brought within fifteen years. In special cases, where a different limitation is prescribed by statute, the provisions of this article shall not apply." 2 R. S. p. 76, sec. 212. But the plaintiff, having a right, as appears by the complaint, to avail himself of the saving clause—sec. 47—in the act relative to the contestation, &c., of wills, &c., the judgment must be reversed. *Id.* 319.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded.

Thos. A. Hendricks and *M. M. Ray*, for the appellant.

Davis, Wright & Major, for the appellees.

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ESTEP v. LARSH.

DEPOSITIONS.—A deposition may be good in part and bad in part.

DEPOSITION—WITNESS.—Where the deposition of a witness is taken in a cause, and it is agreed by the parties that the deposition shall be read upon the trial, at all events, without reference to the presence or absence of the witness at the time of the trial, it is not error to admit the deposition in evidence, although the deponent had already been called and examined and cross-examined orally in the cause.

PRESUMPTION.—Where there is nothing in the record inconsistent with such presumption, this Court will presume in favor of the action of the lower Court.

RULE 30.—The words, "which is all the evidence given to the jury in this case," at the conclusion of a bill of exceptions, are not a compliance with Rule 30.

PRACTICE.—Where several instructions are given to the jury, a party, asking a new trial on the ground of alleged error in the instructions, must point out with reasonable certainty and particularity the error complained of.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—This was an action by *Larsh* against *Estep*, commenced under the old system of procedure. The declaration consists of three counts. The second and third counts make no point in the case, and will not, therefore, be farther noticed. The first is upon an agreement in writing which reads thus:

"This agreement, made this 13th of *December*, 1851, between *Leroy M. Larsh* and *John W. Estep*, both of *Wayne* county, *Indiana*, witnesseth: that *Larsh* has sold to *Estep* his undivided interest in the saw mill and land purchased by said *Larsh* of *William S. T. Morton*, and of which *Larsh* had heretofore sold *Estep* one undivided half, and *Estep* has agreed to pay said *Morton* the balance of the purchase money due him

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on said property, and has executed his notes for the same, and has received a title bond for the same from *Morton*. And it is agreed between the parties that the saw mill is to be completed by the parties in the same manner as if this agreement had not been made, under the arrangement with the millwright. It is further agreed that the undivided half of said *Larsh* of the saw mill and premises, and privileges thereunto belonging, shall be appraised under oath as finished at its cash value on hand, by two disinterested appraisers, one to be chosen by each party, and if the two can not agree, they, the two, are to select a third disinterested party, appraiser, and the appraisement so made by such appraisers, or any two of them, shall be final between the parties; and then one undivided half of all the joint debts and demands against said *Larsh* and *Estep*, on account of said mill and improvements, after deducting credits or offsets, shall be deducted from such appraisement, and which debts and demands said *Estep* hereby agrees to pay, after deducting credits and offsets, and then said *Estep* agrees to pay said *Larsh* such appraisement as follows, to-wit: One half the amount when the saw mill shall be finished and possession exclusively given to *Estep*, deducting from the first payment the debts so to be paid for said parties, and the other half in one year from the 1st of *January* next, deducting from the sum last due 281 dollars and 77 cents, assumed to be paid to *Morton* by *Estep* on the premises. *Estep* is also to have in the above contract the joint personal property now belonging to the parties, including a new log wagon now being made for said parties at *Richmond*, which property (that is *Larsh's* half of the same,) is included in the sale by *Larsh* to *Estep*, and is to be appraised with the mill and premises, and in the same manner. The rock on the premises said *Larsh* is to retain as his property, and the brick said *Estep* is to pay *John Wilson* for, and pay said *Larsh* one dollar per thousand for hauling the same, and

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then they shall belong to said *Estep* as his property. It is also understood that the mill-privilege, mill and lands are to be appraised by said appraisers as they now are, and subject to any back water upon them.

"LEROY M. LARSH, [SEAL.]

"JOHN W. ESTEP," [SEAL.]

It is averred that the plaintiff, after the execution of the agreement, proceeded to complete the saw mill, which was done on the 25th of *December*, 1851, when possession of the same was exclusively given to and accepted by *Estep*; that *Enock Railsback* and *Andrew Hunt* were chosen by the parties appraisers of the undivided half of the mill property, who, having failed to agree, chose *David Commons* a third appraiser, and that, on the 26th of *December*, 1851, they, the appraisers, having been first duly affirmed, appraised said mill, privilege, premises, and personal property described, &c., at 1,725 dollars, said mill being appraised as finished and subject to back water thereon, &c. It is also averred, substantially, that the plaintiff hath performed all the stipulations in said agreement on his part to be performed, but that defendant has refused to pay, &c.

There were issues upon the complaint or declaration, and upon pleas of payment, set-off, &c. The issues were submitted to a jury, who found for the plaintiff 1,123 dollars. And the Court, having refused a motion for a new trial, rendered judgment, &c.

The written appraisement above referred to is as follows:

"The undersigned, *Enoch Railsback*, chosen by *Leroy M. Larsh*, and *Andrew Hunt*, chosen by *John W. Estep*, as appraisers to appraise the undivided half of a certain saw mill, privilege and premises and property, pursuant to an agreement between said *Larsh* and *Estep* on the 18th of *December*, 1851, who, after being duly sworn to make such appraise-

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ment, and having viewed said premises and property, and being unable to agree we selected *David Commons* as a third appraiser, who, also, being affirmed to make such appraisement, and after due deliberation, we, the said *Railsback, Hunt* and *Commons*, do appraise the undivided half of said saw mill, privilege and premises, and the personal property described in said agreement, at 1,725 dollars, the said saw mill being appraised as finished, agreeably to said agreement, and the mill privilege subject to the back water now on the same.

“Witness our hands this, 26th day of *December*, 1851.

“*ENOCH RAILSBACK,*

“*ANDREW HUNT,*

“*DAVID COMMONS.*”

The errors in the case at bar are thus assigned: 1. The Court erred in admitting the depositions of *Hill, Wolf, Burgis* and *Commons* to be read in evidence. 2. In the instructions given to the jury. 3. In refusing instructions moved by the appellant. 4. In admitting the appellee to testify; and 5. In overruling the motion for a new trial.

1. As to the admission of the depositions of *Hill, Wolf* and others. The objection to the admission of these depositions is that they were irrelevant. They were admitted as rebutting evidence; and we might dispose of the objection made to them at once, by stating that all the evidence given in the cause is not shown to be in the record, and, hence, we might presume that this rebutting evidence was relevant to evidence given by the defendant. But we think the evidence might naturally become relevant upon a trial of the issues in the cause. Questions naturally arose upon the trial as to whether the mill had been finished according to contract, as to whether it filled representations as to capacity, &c., and why *Estep* refused to pay for the mill after taking possession. Now, any evidence which tended to show that *Estep*

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put his refusal to pay upon ground other than the fulfillment by *Larsh*, of his precedent obligations tended to establish an admission that *Larsh* was not in default, and that *Estep* was insincere in now so insisting. We think such was the tendency of the depositions objected to; and, it may be remarked, a part of a deposition may be legal evidence and a part not.

We will now quote one of the admitted depositions, objected to as above, as a sample of all:

"*Daniel Wolf*, being sworn, deposeth and says: I had a conversation with *Mr. Estep*, after the occupation of the mill by *Estep*, and after the commencement of suit against him by *Larsh*. *Estep* told witness that *Larsh* had sued him, and that he knew a man that would pay him all the costs of suit for the use of the money as long as they could keep *Larsh* out of the money."

An additional objection is made to the admission of the deposition of *Commons*. It is thus presented in the record: "And thereupon the plaintiff offered to read in evidence the deposition of *David Commons*, on file in this case, to which the defendant objected on the ground that said *David Commons* had been examined by the defendant and cross-examined by the plaintiff as a witness on this trial and was in Court, which the Court admits to be the fact; but the Court admitted said deposition to be read to the jury, on the ground that the following agreement had been made between the attorneys of the parties, on the 29th day of *March*, 1858, viz:

" <i>Leroy M. Larsh</i>	} In the <i>Putnam</i> Court of Common Pleas.
" <i>John W. Estep</i>	
} Complaint on award, agreement, &c.	

"The undersigned, attorneys for the parties in the above suit, for the sake of saving time and expense to both parties, agree to use, in the above case, the depositions heretofore

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taken between the same parties in a cause on 'said award, agreement, &c., in the *Putnam* Circuit Court. And it is also agreed that in case *Enoch Railsback* is not used as a witness in said case, that it is to be admitted on the trial of the case that said appraisers were sworn according to law. *March 29, 1858.*

NEWMAN & SIDDALL, Att'ys for defendant.

"J. B. JULIAN, plaintiff's attorney.

"And before entering on the trial of this case at this term it was agreed by the attorneys for the parties to extend the terms of that agreement to the trial of this case."

In admitting the deposition the Court acted strictly upon the agreement of the parties. Does anything appear showing that action erroneous? If so, what is it? It appears that the witness was in Court; but the parties had agreed at the opening of the trial, as we may presume, that the deposition should be read without any proviso as to the presence or absence of the witness. See *Griffin v. Templeton*, 17 Ind. 234. It further appears that the defendant called the witness and examined him, and that the plaintiff cross-examined him, but to what? Here was the plaintiff's witness; the plaintiff had taken his deposition. The defendant had agreed, without qualification, that that deposition should be read on the trial; but, notwithstanding this agreement of the defendant that the plaintiff might read the deposition, he, the defendant, sees fit to and does call the witness as his witness, examines him, and the plaintiff cross-examines him, but to what, is not stated in the bill. Now, although the defendant had called *Commons* as his witness and the plaintiff had cross-examined him as to the matters inquired into by the defendant, still this did not preclude the plaintiff from calling *Commons* again as his witness to new matter; and if he had a right to call the witness, there is nothing in the record showing that he had waived his right, under the agreement, to use his deposition

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instead. The Court below, who saw and heard all connected with the matter, could judge better of the intention of the parties than we can; and where there is nothing inconsistent with such presumption in the record, we must presume in favor of the action of the Court below. And this further question might be asked, what harm is shown to have been done? If the testimony of *Commons* was the same on the trial and in the deposition, what harm was done? There is nothing showing it different. But, if it was different, and the proper foundation was laid, the deposition might have been admissible to contradict, &c. We see no aspect of the case presented by the record authorizing a reversal on the point now being considered.

2. As to the admission of *Larsh* as a witness. The objection was not to the competency of *Larsh*, but to the uncertainty of his statement. He testified touching the amount of partnership debts *Estep* had paid under the agreement sued on, and for which he was to have credit. He said he knew the amount was 139 or 140 dollars; that he had taken down the items when the parties were presenting the case to arbitrators, &c., but could not then state the items, &c. His want of recollection in these particulars went to the credibility of his statement, not to its competency.

3. The motion for a new trial, we can not consider upon the weight of evidence. A bill of exceptions containing evidence closes thus: "Which is all the evidence given to the jury in this case."

4. As to the instructions given and refused. The motion for a new trial, so far as based on the giving and refusing instructions, is in these words: "Because the Court erred in the instructions given to the jury. Because the Court erred in refusing the instructions prayed by the defendant and refused by the Court."

The instructions refused were asked with reference to the

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law arising upon a case made by evidence, but as that, we have seen, is not in the record we must presume the instructions were refused because not justified by the evidence. See cases in Davis' Dig. 510. Thirteen long instructions, some of which were certainly right, were given, and excepted to thus: "To the giving of which instructions, and each paragraph thereof, the defendant immediately excepted."

Then, as we have seen, the objection to them in the motion for a new trial was thus: "The Court erred in the instructions given to the jury." The cases of *Robinson v. Hadley*, 14 Ind. 417, and *Elliott v. Woodward*, 18 *id.* 183, show clearly that we can not notice the assignment of error upon the instructions.

Per Curiam.—The judgment below is affirmed, with 5 per cent. damages and costs.

David McDonald and *John S. Newman*, for the appellant.

James Perry, *J. B. Julian* and *I. F. Julian*, for the appellee.

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FRAUDULENT REPRESENTATIONS.—As to what misrepresentations in the sale of property will be deemed fraudulent, see the opinion at length.

PRACTICE—PLEAS IN ABATEMENT.—The defence of another action pending is matter in abatement, and, as a general rule, must be pleaded before defences in bar.

PLEADING—FORMER RECOVERY.—A judgment for costs on sustaining a demurrer to a complaint, where the plaintiff declines to amend, and his action is therefore dismissed, can not be pleaded as a former recovery in bar of a subsequent action for the same cause, unless the record affirmatively show that the merits were decided upon the demurrer.

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APPEAL from the *Putnam* Common Pleas.

PERKINS, J.—This suit is upon the same agreement and appraisement as the foregoing suit between the same parties, from the *Wayne* Circuit Court, and is for the second installment therein mentioned. The evidence in the record is contained in a bill of exceptions. We have carefully examined it. It makes this case:

Larsh and *Estep* were the joint owners of a saw mill, near *Centerville*, *Wayne* county, *Indiana*, and had been running the same some eight months or more. The mill had become old and out of repair, and they concluded to rebuild it. They also contemplated erecting a flouring mill in connection with the saw mill, and had dug a race as a commencement of the undertaking. The plan of the saw mill had been agreed upon, and the building partly erected. It had been agreed to put in the "Union Wheel," and the wheel had been brought to the mill. That wheel had been adopted upon the suggestion of *Larsh*. The millwright had charge of the job. At this point, *Estep* and *Larsh* made the trade described in the agreement set out in the preceding case. *Estep* purchased the half of the mill owned by *Larsh*, at a price to be fixed by appraisers. *Estep* knew all about the property he was purchasing; he stood on equal ground with *Larsh*. The appraisers met, *Larsh* and *Estep* being with them. The appraisers told *Larsh*, as seller, to do his best in praising the property, and *Estep*, as purchaser, to do his best in decrying it. It would seem that the appraisers were prepared to duly appreciate representations, and to receive them with proper caution.

According to the evidence, *Larsh* said it was reasonable to suppose the mill, when completed, would cut 2,000 feet of lumber a day, and, in this, *Estep* concurred with him. It was matter of opinion with both of them as to how the thing would perform in future. *Larsh* said it would cost 100 dol-

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lars to fill up the race that had been dug, or to dig it, and *Estep* said it would not cost 20 dollars. They got warm over it, and the appraisers told them, says the witness, "to dry up," or they would not make any appraisement in the premises, and we hear no more of representations by either party, nor whether the appraisers valued the race at much, little or nothing, nor whether it really had anything to do with the trade. The property was appraised, and there is no charge of any fraud or unfairness on the part of the appraisers. The mill was subsequently finished under the contract and received by *Estep*. It did not perform as was expected, though *Miller*, the millwright, says the reason why it did not was that the wheel was a little obstructed by a piece of timber; he says the obstruction could have been removed for five dollars, when the wheel would have performed well, and he so told *Estep*, but *Estep* would not allow the obstruction to be removed.

Estep now refuses to pay *Larsh*, because of his alleged fraud in representing to the appraisers that the mill would, when completed, cut 2,000 feet of lumber a day, and that it cost to dig, or would cost to fill up, the mill race, 100 dollars.

We can not discover, from the evidence, any ground for charging the least attempt at fraud upon any one concerned in the transaction. *Estep* purchased the property of *Larsh*, and agreed to take it at a price to be fixed by certain third persons, and *Larsh* sold upon these terms, and we do not see where, up to this point, there was any fraud. It is difficult to perceive how *Larsh* could have perpetrated a fraud on *Estep* in agreeing to sell him his half of the parcel of joint property of which both were then, and for a considerable time had been, in the possession and use, at a price to be fixed by disinterested persons. The third persons provided for, fixed the price. Now, both parties are bound by the price thus fixed, if there is nothing to vitiate the action of the ap-

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praisers, but error of opinion as to value. *The Board of Trustees, &c. v. Cokely*, 5 Ind. 164.

The case appears to us so clear upon the evidence, that we might disregard the instructions. We have, however, examined them. Objection is made to two instructions. One in which the Court told the jury, that representations, by *Larsh* to *Estep*, touching the property, must have been knowingly false to be fraudulent; and another, in which he applied the same rule to those made by *Larsh* to the appraisers. These instructions must be considered as applicable to the evidence in the cause. That evidence, so far as these instructions had any applicability to it, was the statement of *Larsh*, that the mill, completed and run with the Union wheel, might be expected to cut 2,000 feet of lumber a day. We say this is the evidence, because counsel, in their briefs, do not pretend to rely upon the statement about the mill race. Now, certainly, as applicable to this evidence, the instructions could not be wrong. The parties were building a mill upon a plan agreed upon between them. They adopted a wheel according to their best judgment. There is nothing tending to show design in *Larsh* on this point. The mill was not completed, had not operated. It was an experiment. Both parties appear, by the evidence, to have had equal means of conjecturing and judging. The matter spoken of was not an existing fact, but a future probability. It does not appear that the plan of the mill was proposed by *Larsh*. Now, surely, if a party could make fraudulent representations in such a case, which we do not admit, they must consist not in expressing an erroneous honest opinion, but in expressing knowingly an erroneous one. See *Jenkins v. Long*, 19 Ind. 28. There is nothing showing recklessness on the part of *Larsh*. That it may be seen whether we have rightly stated the evidence, we copy all that was said by *Larsh* to the appraisers.

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Andrew Hunt, one of the appraisers, says: "I don't think *Mr. Larsh* said particularly what the mill would do. During the time the appraisement was being made, it was said that it would be reasonable to suppose the mill would cut two thousand feet a day. *Estep*, as well as *Larsh*, so supposed. I supposed so, because a good saw mill will do that."

David Commons, another of the appraisers, says: "*Estep* and *Larsh* both thought it would be a first-rate mill. The frame-work of the mill was good. My understanding was, that it would cut 2,000 feet a day. A little over 100 dollars would have removed all defects, afterwards discovered in the running of the mill, and made the mill run well."

John W. Estep, the defendant below, now appellant, says: "*Larsh* spoke confidentially, that the mill, when finished, would cut 2,000 to 2,400 feet of lumber a day."

Enoch Raileback, one of the appraisers, says: "When we made the appraisement, the wheel was there before us; the mill was not finished. The mill wright described to us what was to be done to finish it. He was acting under the directions of *Larsh* and *Estep*. We were three days in examining and appraising. *Larsh* and *Estep* were present. The parties said it was thought the mill would cut about 2,400 feet of plank in a day, or in twenty-four hours. *Larsh* had great confidence in the Union wheel. *Estep* not so much. *Larsh* said to *Estep*, when the appraisement was being written, that he would guaranty it to cut 2,400 feet a day, if he, *Estep*, would allow extra if it went over that. This *Estep* would not do, and the subject dropped. *Larsh* made the above proposition to *Estep*, in reply to a request upon him by *Estep*, to warrant the mill to cut a certain amount. This was between *Larsh* and *Estep*."

Benjamin Miller says: "That *Larsh* said, at the appraisement, that if the Union wheel worked as well as the agent represented, the mill would cut 2,000 feet a day."

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Le Roy M. Larsh says: "He explained the sources of his information about the wheel, and did not pretend to know anything of his own knowledge; supposed it would cut two thousand feet, if it proved to work as well as recommendations certified. *Estep* knew all that he did about it. Never made any warranty in the trade."

Such is substantially the evidence of the statements to the appraisers, and we see nothing in them proving fraud on the part of *Larsh*.

It is well settled, as a general proposition, that expression of opinion, as to utility, service, &c., is not a representation of a material fact. This principle often comes up in cases of the sale of patent rights, &c. See *Gatling v. Newell*, 9 Ind. 572, and cases cited. And in cases of stock procured to be subscribed in corporations. *Anderson v. The New Castle, &c., Company*, 12 Ind. 376, and cases cited.

As to what representations will amount to fraud; as to whether the party making them must believe them to be false; or only not know that they are true; and as to when the party to whom they are made may rely on them, though he has the means of ascertaining their falsity; and whether there is any difference, in these respects, between contracts touching personal and real property, are points not involved in the case made by the record before us, and we shall not, therefore, discuss them; but for future convenience, we cite some pertinent authorities upon them, apparently not easily reconciled. 2 Par. on Cont. 281, 282; Chit. on Cont. 589; *Taylor v. Ashton*, 11 M. & W. 415; *Hazard v. Irwine*, 18 Pick. 85; 3 Story's C. C. R. p. 733; *Belknap v. Sealey*, 14 N. Y. Ct. of App. 143; *Haight v. Hoyt*, 19 id. 464; *Bennett v. Judson*, 21 id. 238; *Hoe v. Sanborn*, id. 552; *Kertz v. Dunlop*, 13 Ind. 277; *Zehner v. Kepler*, 16 id. 290; *Matlock v. Todd*, 19 id. 130. These cases, with the references found in them, furnish an

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ample source from which to draw legal information on the subjects suggested.

After the cause had been to the Supreme Court, and returned to the Common Pleas reversed, the defendant answered anew. He filed the general denial, and a paragraph of prior action pending, and, also, one of former judgment recovered.

Prior action pending is matter in abatement, and, as a general rule, must be answered before the general denial is filed. *Kenyon v. Williams*, 19 Ind. 44. In a note to 1 Chit. Pl. p. 456, it is said: "Pleas in abatement can not be put in after pleas in bar, unless under special circumstances, of which the Court must judge. *Biddle v. Stevens*, 2 Serg. & R. 537; *Palmer v. Evertson*, 2 Cowen 417; *Ripley v. Warren*, 2 Pick. 593," and several other cases.

Former judgment recovered for the same cause of action is matter in bar; and the question in this case is, therefore, whether the answer of such judgment, in this case, was a valid one. The former judgment set forth in the answer was one against the plaintiff, for costs on, as is said, a demurrer being sustained to his complaint. The demurrer is not in the record set out in the answer, and we do not know, therefore, the cause assigned for demurrer, but the ruling of the Court was, if we may believe the Clerk, that the demurrer was sustained, and leave given the plaintiff to amend. The plaintiff declined to amend, and, on motion, his motion for aught we know, judgment for costs was rendered against him, the cause going out of Court. So far as the record legally shows anything, it shows a dismissal. This was not a judgment that would bar another action. The appellant cites Bacon's Abr. Tit. Pleas and Pleading, N. 4, to show that a final judgment may be rendered upon demurrer that will bar a subsequent action for the same cause. And the case of *Bouchand v. Dias*, 3 Denio, 238, is to the same effect.

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We do not doubt this, but it must appear that the merits were decided. Says Judge *Story*, in *Edman v. Rives*, 10 Pet. 298: "A judgment that a declaration is bad in substance, can never be pleaded in bar to a good declaration for the same cause of action. Such a judgment is, in no just sense, a judgment upon the merits." See, also, *Stevens v. Dunbar*, 1 Blackf. 56. See, also, 6 Blackf. 56.

Now, in the case at bar, we know that the Court decided, that the plaintiff should amend his declaration, and that the cause went out of Court at the plaintiff's costs; but whether upon some point of form, or otherwise, we know not. We do not know, from the showing of the answer of former recovery, what was decided in the judgment of former recovery pleaded. We take it that such a judgment can, in no just sense, be held to be a judgment upon the merits.

One other point is made. It is contended that the appraisement made is void for this reason, viz: the agreement that an appraisement should be made was entered into on the 13th of *December*, 1851, and provided that it should be made subject to the back water then on the property. The appraisement was made on the 26th of *December*, 13 days after the agreement, and was made subject to the back water, following the language of the agreement, "now on the property." It is contended that the appraisement should have been made, subject to the back water on the property, on the 13th, instead of the 26th of *December*. The parties were both present when the appraisement was put in writing, and neither of them objected to the manner in which it was drawn on this point, and we think there was no ground for objection. It was not meant, of course, that the appraisers should appraise the property subject to the particular water that was on it on the 13th, because that would have disappeared before the appraisers could reasonably be expected to be notified and visit the property. Yet this is the literal agreement. We

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must then go to construction to determine its meaning. Was it that they should appraise it subject to an amount of water equal to what was on the property on a single given day, viz: the 18th of *December*, 1851? What reason could there be for such a construction? *Estep* was buying the property for use in all time to come, on all days, and every day. Of what consequence was it, then, as to the water on it, at a given day? We think the spirit of the agreement was, that the property should be appraised subject to its liability to back water, as then situated, considering the dam, embankment, &c.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

David McDonald and John S. Newman, for the appellant.

James Perry, J. B. Julian and I. F. Julian, for the appellee.

HARRIS v. KNAPP et al.

JURISDICTION.—In suits commenced by *capias ad respondendum*, the jurisdiction of a justice of the peace extends throughout his county, and over all persons found therein, whether they reside therein or in other counties.

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—*Knapp and Knapp* sued *Harris* before a justice of the peace in *Wayne* township, *Wayne* county, *Indiana*.

The suit was duly commenced by *capias*. *Harris* was found and arrested in *Wayne* county, taken before the justice, who issued the writ, where he obtained a continuance of his cause for over a month. At the appointed time he appeared, and answered, that the affidavit upon which the *capias* issued, was

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not true, &c. This answer was held bad, both before the justice and on appeal in the Circuit Court, and in both Courts there was a trial of the merits of the case, and judgment for the plaintiffs.

The question in this case is, whether the answer ousted the jurisdiction of the justice of *Wayne* township, *Wayne* county, *Indiana*.

According to the answer, *Harris* was a resident of a township in *Randolph* county, *Indiana*, in which township were justices of the peace, &c., and he was not about, &c.

The cause of action in the suit was transitory, and, at common law, the defendant would have been suable, in a Court of general jurisdiction, wherever found. But the jurisdiction of justices is statutory. Hence, in this case, the statute of the State must settle the question.

Prior to 1861, the civil jurisdiction of justices of the peace, in *Indiana*, stood thus, over persons:

Each justice had jurisdiction over the residents of his township only, except in the following cases:

1. He had jurisdiction by summons over non-residents of any township in his county, though the persons were residents of townships in other counties of the State, if found within the township where sued.

2. He had jurisdiction by summons over non-residents in any township of the State, that is, residents of foreign States, if found within his township.

3. He had jurisdiction by *capias* in cases in which that writ might issue, throughout his county, over all persons found therein.

The act of 1861 made a provision touching persons jointly liable, and extinguished the first exception specified, leaving the second and third in force. 2 G. & H. p. 580, sec. 13. It neither enlarged nor diminished the jurisdiction in *capias* cases, nor did it change the mode of trial in those cases. What

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was, and still is, that mode of trial? It is shown by sections 24, 25, 26, 41, 42, 43 and 44. 2 G. & H. 583, *et seq.* It is a trial on the merits. The truth of the affidavit, on which the *capias* issues, is not brought in question.

Per Curiam.—The judgment below is affirmed, with 10 per cent. damages and costs.

John Yaryan, for the appellant.

H. B. Payne, for the appellees.

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137 510

SOUSER *et al.* v. CUNNINGHAM.

PRACTICE IN SUPREME COURT.—A judgment below will not be reversed by this Court where the record shows that the appellant has not been injured by the alleged error.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—This was a suit by *John Cunningham* against *Jacob Souser* and *Frederick Kalburn*, based upon two joint and several promissory notes made by the defendants to the plaintiff.

Souser made no answer to the complaint.

Kalburn answered, making his answer a cross-complaint against *Souser*, and alleging that the consideration of the notes was the conveyance to *Souser* by *Cunningham* of certain lots of ground situate in *Americus*, *Tippecanoe* county, *Indiana*; that *Souser* was thus the real debtor, and he, *Kalburn*, but surety in the notes sued on; that *Souser* was insolvent, but that he was then "the owner of and in possession and use of said lots under said conveyance," and he prayed that the Court, in rendering judgment in the case, would specially order that, after the other property of *Souser*, if he had any,

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should be sold, the said lots, also, should be sold to pay the plaintiff's judgment, when rendered, on the notes in suit, before the property of said surety should be taken, on the ground that they were for the purchase-money of said lots, and a lien upon the same, in favor of the surety, *Kalburn*.

Souser, *Kalburn's* co-defendant, demurred. The Court sustained the demurrer to the paragraph, it constituting the entire answer of the defendant, *Kalburn*. *Kalburn* excepted to the ruling of the Court, and then obtained leave to answer further. He then answered as follows:

He admitted the making of the notes; averred that *Souser* was principal and he but surety, asked that the question of suretyship should be tried, and judgment entered that the property of the principal be first exhausted, &c. The cause was then submitted to the Court. The Court found for the plaintiff generally on the notes, as a matter of course, because they were admitted by both defendants. The Court found further that *Kalburn* was surety, and ordered that the property of *Souser*, subject to execution, should be first exhausted, &c. The evidence is not in the record.

There was no motion for a new trial, and there is no bill of exceptions in the record. It is claimed that the Court erred in sustaining the demurrer of *Souser* to the first answer of the defendant, *Kalburn*. It will be observed that the only question in the cause is between the two defendants.

Now, passing by the question as to whether the rule that, where a defendant, instead of standing upon his pleading when a demurrer has been sustained to it, answers over, and thereby waives the error, applies in this case; we may inquire whether, supposing the first answer good and the Court in error in holding it bad, it appears by the record that *Kalburn*, the appellant, has sustained injury from the ruling; for if it does not, but rather the contrary, then no reason is shown for reversing the judgment in the cause.

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By the judgment as rendered, *Kalburn* is protected from liability on the judgment against him and *Souser*, till *Souser's* property, subject to sale for the making of the judgment, is exhausted; and there is nothing in the record showing that the lots for which the notes were given are not a part of his property liable to be thus sold; but, on the contrary, the presumption from the record is that they are a part of such property.

It is shown that the fee of the lots is in *Souser*; that he is in possession of them, and that they are subject to the lien of the judgment.

It is not shown that *Souser* is a person entitled to claim any property as exempt from execution; and it is not shown that any third person had acquired a lien upon the lots; hence, for aught that appears, they are subject to sale on the judgment in this suit, as *Souser's* property, before *Kalburn* can be disturbed.

The question which the appellant desires us to decide is, conceding that *Cunningham*, the seller of the lots, waived his vendor's lien upon the lots by taking security upon the notes for the purchase-money, does it not exist, upon equitable principles, in favor of the surety, so that he may compel the plaintiff to sell upon it against the principal before looking to the surety? Now, as we have said, it does not appear that the decision of this question is material, because it is just as well for the surety that the lots be sold on the judgment lien of *Cunningham*, the seller of the lots and the plaintiff in the suit, as upon the lien of a vendor; if, upon any principle, such lien exist in favor of the surety. See, as to this point, however, *Cox v. Ward*, 20 Ind. p. 54.

Per Curiam.—The judgment below is affirmed, with costs and 1 per cent. damages.

H. W. Chase and *J. A. Wiltach* for the appellants.

Daniel Mace, for the appellee.

Street v. Swain et al.

STREET v. SWAIN *et al.*

CONTRACT—DAMAGES.—In an action upon a building contract, for extra work, the measure of damages is the price agreed upon, or, if there was no such agreement, then the reasonable value of the work, unless the extra work were done under the original contract, when the rule might be different.

APPEAL from the *Wayne* Common Pleas.

HANNA, J.—In this case the appellees, partners, sued the appellant for work and labor, and materials. Answer, that the work, &c., was performed in the erection of a house for the defendant by the appellees, as the agents and servants of one *Doan*, who had undertaken by special contract in writing to build the same, &c. 2d. General denial. 3d. That *Doan* and defendant had accounted and settled, &c. 4th. By way of counter-claim, that by reason of variance from the plan, &c., said building was 40 dollars less expensive, and that the plaintiffs failed for seven months to complete said house, wherefore, &c.

These pleadings were filed before a justice. Trial and judgment there for the defendant. On appeal to Common Pleas, judgment for the plaintiffs for 25 dollars was rendered.

It appears from the evidence that the appellant had contracted with *Doan* and had settled with him for the work done under that contract. It also appears that the original plan was not adhered to, some parts being left off, and other work not therein specified having been performed. The only question is, to whom should the appellees look for pay for the work not specified and thus performed by them? The evidence is conflicting as to whether the appellant, in directing the changes, promised to pay the plaintiff therefor; it does not show directly that the extra work was taken into consideration in the settlement between *Doan* and *Street*. These were questions for the jury.

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But it is urged that the law is, on these building contracts, that the employer may, during the progress, make immaterial changes without affecting either the validity of the contract or the prices to be paid. That the changes made were not material, and the work was therefore done under the contract and settled for with *Doan*.

Whether in this proposition the law is correctly stated, we need express no opinion; for it appears to us the Court, in the instructions, plainly pointed out to the jury that *Street* was not liable for work, to the plaintiffs, unless the same was performed under a new and substantive contract with them in reference thereto.

The Court said to the jury that if there was a finding for the plaintiffs, the measure of damages would be the price agreed upon, or if there was no such agreement, then the reasonable value of the materials and work.

This is said to be wrong, because it does not direct them to ascertain the price with reference to the proportion it would bear to the contract price of the job.

This may be the rule if the extra work had been performed under the original contract, but as by the verdict of the jury, under the instructions, it was necessarily determined by them that there was a new contract with the plaintiffs, we are of opinion that the instructions were correct on that point.

Per Curiam.—The judgment is affirmed, with costs.

W. A. Bickle and *Chas. H. Burchenal*, for the appellant.

H. B. Payne and *J. P. Siddall*, for the appellees.

Kendall et al. v. Morton.

KENDALL *et al.* v. MORTON.

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155	586

PROMISSORY NOTE—CONTRACT.—A note in the form following creates a personal liability to pay on the part of the persons who sign it:

\$25.00.

Cambridge City, July 1st, 1860.

"Six months after date, we, the subscribers, promise to pay to the order of *A*, 25 dollars, without any relief from valuation or appraisement laws, value received, on behalf of *Cambridge City Greys*.

A. B.,

C. D.,

E. F., Sect."

APPEAL from the *Wayne* Circuit Court.

PERKINS, J.—Suit upon three promissory notes of like tenor, one of which reads thus :

"\$25.00

Cambridge City, July 1st, 1860.

"Six months after date, we, the subscribers, of *Cambridge City*, county of *Wayne*, and State of *Indiana*, promise to pay to the order of *Benj. Conklin*, 25 dollars, without any relief from valuation or appraisement laws, value received, on behalf of *Cambridge City Greys*.

JAMES M. COCKEFAIR,

"REESE KENDALL,

"DAVID CONKLIN, Sect."

The notes were assigned by *Conklin* to *W. S. T. Morton*, who sued upon them.

The simple question is, whether *Cockefair*, *Kendall* and *Conklin*, the signers of the notes, or the *City Greys*, are liable upon them as the makers.

The phraseology of the notes sued on is very peculiar. We think the promise in the note is personal on the part of *Cockefair*, *Kendall* and *Conklin*. We think the case more nearly resembles that of *The Board, &c. v. Butterworth et al.*, 17 Ind. 129, than it does *McHenry v. Duffield*, 7 Blackf. 41.

The State v. Williams.

See *Kenyon et al. v. Williams*, 19 Ind. 44, and also *Tousey v. Taw et al.*, *id.* 212, where the authorities on the legal question raised and discussed in the case at bar are collected. See, also, *Hobbs v. Cowden*, 20 Ind. 310.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

Lafe Develin and *Geo. A. Johnson*, for the appellants.

Geo. Holland and *J. F. Kibbey*, for the appellee.

THE STATE v. WILLIAMS.

CRIMINAL LAW AND PRACTICE.—For a sufficient form for an information for malicious trespass, see the opinion.

APPEAL from the *Hendricks* Common Pleas.

Per Curiam.—The information in this case charges that the defendant on, &c., at, &c., “did maliciously and mischievously injure one wagon, the property of *Peter S. Kennedy*, of the value of 40 dollars, by then and there removing from the ends of the axletrees of said wagon the nuts or taps on the same, and by then and there removing the hammer and neck yoke of said wagon where the said *Kennedy* could never find them—the said taps, hammer and neck yoke—which taps, &c., were of the value of 7 dollars, and by means of said injuries the wagon was damaged 7 dollars; all to the damage of said *Kennedy* 7 dollars.” The defendant moved to quash the information; the Court sustained the motion, and the plaintiff excepted.

We perceive nothing objectionable in this information. It charges affirmatively that the defendant, by removing the taps, hammer and neck yoke from the wagon, damaged it 7 dol-

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lars; and whether the wagon was thus injured was a question for the jury. *The State v. Clevinger*, 14 Ind. 366.

The judgment is reversed, with costs. Cause remanded for trial.

Oscar B. Hord, Attorney General, and John C. Bufkin, for the State.

THE STATE ex rel. MOUNT v. STEELE.

GUARDIAN AND WARD—BOND.—The additional bond given by a guardian, in an application to sell the real estate of his ward, under § 18, 2 G. & H. 571, is not discharged by the fact that, on reporting the sale of the real estate, he produced the proceeds of the sale in Court and then withdrew them by order of the Court.

SAME.—Such a bond is not merely subsidiary to the original bond given by the guardian, but is an independent undertaking, and can only be discharged by the actual payment of the moneys arising from the sale of the real estate, according to law, to the ward, or other person entitled to receive the same, and suit may be instituted upon such bond whenever it is broken, without first resorting to the original bond.

SAME.—The guardian, and not the judge or clerk of the Court, is the proper custodian of the moneys arising from the sale of the ward's real estate.

The cases of *Salzer v. The State*, 5 Ind. 202, and *Salzers v. Ross*, 15 *id.* 130, are distinguished from the present.

APPEAL from the *Boone* Common Pleas.

WORDEN, J.—Action by the appellant against the appellee, upon a bond given by a guardian upon application for the sale of his ward's real estate. The bond was given for the

The State ex rel. Mount v. Steele.

purpose and in the form contemplated in the following statutory provision: "Upon the appraisement of said real estate being filed in writing, signed by said appraisers, the Court shall require such guardian to execute bond, with sufficient freehold sureties, payable to the State of *Indiana*, in double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment and accounting for of all moneys arising from such sale according to law." 2 R. S. 1852, p. 327.

There were two paragraphs in the complaint. The first, after alleging a sale of the relator's real estate, by order of the Court, and the receipt by the guardian of the sum of 1,700 dollars therefor, states by way of breach that the money thus received by the guardian was produced by him in Court at the time he made his reports of the sales of the property, but that it was withdrawn by him by order of the Court, and has been by him converted to his own use. That the guardian has neglected and refused to pay or account for said moneys to the proper Court and to the relator, who arrived at majority in *March*, 1859.

A demurrer was sustained to this paragraph, and the relator excepted.

The second paragraph alleges, by way of breach that the guardian sold certain real estate of the relator for 250 dollars, but falsely reported to the Court that he had only received 150 dollars, and fraudulently converted to his own use 100 dollars, and refuses to account for and pay the same over according to law.

A demurrer to this paragraph was overruled, and the defendant excepted.

The appellee assigns a cross-error upon the decision overruling his demurrer to the second paragraph. This we will notice first, as the objection made to this paragraph applies as well to the first. It is urged that the bond in suit is merely

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subsidiary to the original bond given by the guardian for the faithful performance of his duties, and that no action can be maintained upon it until the original bond is exhausted. We are of a different opinion. The bond in suit is an independent undertaking, and suit may be brought upon it whenever it is broken, without having first resorted to the original bond of the guardian. This view is not in conflict with the cases of *Salzer v. The State*, 5 Ind. 202, and *Salzers v. Ross*, 15 Ind. 130, as the bonds in these cases were given under a statute which, as was held, left it discretionary with the Court to require an additional bond or dispense with it. Here we have seen, by the statute above set out, that no such discretion is vested in the Court. In no case can the ward's land be ordered to be sold without giving the required bond.

The cross-error is not well assigned.

We come to the first paragraph of the complaint, and that, in our opinion, was also good, and the demurrer should have been overruled. It is claimed by the appellee that when the guardian brought the money into Court, upon making report of the sale, and received it back by order of the Court, the money went into the general fund, and the bond in suit had "performed its office."

The bond we have seen was conditioned "for the faithful payment, and accounting for, all moneys arising from such sale, according to law." This condition requires not only the accounting for the moneys, but their payment according to law. Their payment according to law signifies payment to the ward, or other persons entitled to receive the same. To be sure, when the guardian reports the sale of real estate, he is required to produce the proceeds of the sale and the notes, &c., given to secure the purchase-money. 2 R. S. 1852, p. 328, sec. 21. But this production of the proceeds can be no discharge of the obligation to pay the same according to law. When produced, neither the Judge of the Court, nor the

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Clerk thereof, is the proper custodian of the funds. The statute does not require the proceeds to be paid over to the Clerk, or any other officer, but leaves them in the proper custody of the guardian.

For the error in sustaining the demurrer to the first paragraph of the complaint, the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs, and the cause remanded.

R. C. Gregory, for the appellant.

S. C. Willson, for the appellee.

CRAIN v. HILLIGROSS.

PRACTICE—DISMISSAL.—Under §§ 363 and 365, of the code, 2 G. & H. 216, a plaintiff may, at any time before the jury retire, or the finding of the Court is announced, dismiss his action, without prejudice; and a defendant, who has pleaded a set-off, must, as to that, be regarded as a plaintiff, and may, therefore, in like manner, dismiss as to his set-off.

APPEAL from the *Rush* Circuit Court.

WORDEN, J.—Action by *Hilligross* against *Crain* on an account.

The defendant answered, amongst other things, in two paragraphs, by way of set-off. The cause was tried by the Court. After trial, and before the finding of the Court was announced, the defendant desired to dismiss his two paragraphs, setting up the set-off, but the Court refused to permit him to do so, and he excepted.

This ruling, we think, was erroneous. A plaintiff has a

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right, at any time before the jury retire, or, where the cause is tried by the Court, before the finding of the Court is announced, to dismiss the action without prejudice. 2 R. S. 1852, p. 120, sec. 363. A defendant who pleads a set-off, is, in respect to such set-off, really and substantially a plaintiff. In respect to his set-off, he is the actor, and his set-off is his cause of action. Where a defendant pleads a set-off, the plaintiff must answer it, and can not get out of Court by dismissing or abandoning his action against the defendant. Sec. 365. In such cases, the defendant may have judgment against the plaintiff for the amount of his set-off, and in all cases where his set-off exceeds the plaintiff's claim. It seems to us clear, that a defendant, in respect to a set-off pleaded by him, should be regarded as plaintiff, and that he comes within the spirit of the statute above cited.

Per Curiam.—The judgment below is reversed, with costs.

L. & W. O. Sexton, for the appellant.

Wm. A. Cullen, for the appellee.

PAUL v. WARD et al.

PRACTICE—PLEADING.—As to what is a sufficient complaint to entitle a party to a writ of *capias ad respondendum* from a justice's Court, see the opinion at length.

SAME.—In actions commenced by *capias ad respondendum*, if the affidavit is, on its face, sufficient to entitle the plaintiff to the writ, he is entitled to have a trial of the cause upon its merits.

APPEAL from the Wayne Common Pleas.

DAVISON, J.—This was an action by *Ward & Taylor* against *Paul*, commenced, by *capias ad respondendum*, before a justice

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of the peace. The affidavit, upon which the *capias* was founded, is as follows:

“STATE OF INDIANA, Wayne County.

“Personally appeared before me, *Henry Snyder*, a justice of the peace, within and for *Jackson* township, in said county, *Aaron Ward*, who, being sworn, says that *Jesse Paul*, of *Dudley* township, *Henry* county, is justly indebted to him and *Joseph Taylor*, as partners, in the sum of 102 dollars and 92 cents, (to which they have added 10 dollars in damages,) for work and labor, as per bill of items herewith filed; and he further says, that said *Jesse Paul* is now in said *Jackson* township, and that he is about to leave the county, taking with him property subject to execution, with which their demand may be paid, with intent to delay them as his creditors; and, further that their claim is due.

“A. WARD.

“Subscribed and sworn to, this 31st of *January*, 1862.

“HENRY SNYDER, J. P.”

The bill of items referred to in the affidavit reads thus:

Scoring and hewing 549 ft of timber, at 3 cts per ft...	\$16 47
Getting out 818 sleepers, at 1 cent per foot.....	3 13
Framing 75 squares and 18 feet, at 1 dollar per square.	75 18
For raising old barn and shed, 4 days.....	7 00
For laying 456 feet of flooring.....	4 56
Damages as above claimed.....	10 00

They demand judgment for.....\$116 34

The defendant, upon the return of the *capias*, filed an affidavit, alleging, “that, at the time of the filing of the affidavit, and the issuing of the *capias*, he was, and long previous thereto had been, a resident of *Dudley* township, in *Henry*

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county, and that he was not about to leave *Wayne* county, with intent to hinder, delay or defraud his creditors." Upon this affidavit, the defendant moved for his discharge, but his motion was overruled, and thereupon he moved the justice to dismiss the suit on the ground that the plaintiff's affidavit was insufficient. This motion was also overruled, and then he answered, &c. The justice gave judgment for the defendant, and the plaintiff appealed. In the Common Pleas, the defendant again moved to dismiss the suit, because of the insufficiency of the affidavit of the plaintiffs, but the motion was overruled; and, further, he moved to quash the writ issued by the justice, which motion was also overruled. The issues were then submitted to a jury, who, in answer to interrogatories propounded to them by the Court, found specially, "that when this suit was commenced, the defendant, *Jesse Paul* was resident of *Henry* county, *Indiana*; that he was not at, or about the time of its commencement, about to leave *Wayne* county, taking with him property subject to execution, or other means, with which any demand of the plaintiffs, in whole or in part, might have been paid, with intent to delay or defraud his creditors, and that there is due from him to the plaintiffs 80 dollars." The jury also found a general verdict for the plaintiffs. Motion for a new trial and in arrest denied, and judgment, &c.

The errors, so far as relied on for a reversal, are thus assigned:

1. The affidavit, on which the *capias* issued, was insufficient.
2. The Court erred in overruling the motion to dismiss the suit.
3. The jury, having found that defendant was not guilty of fraud, the judgment should have been arrested.

An act, defining the jurisdiction of justices, &c., provides, sec. 24, that "whenever it shall appear, from the affidavit of the plaintiff, that he has a legal demand then due against any

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person then in, or about to come in, any county, and that such defendant, as the affiant believes, is about to leave the State or county, taking with him property subject to execution, or other means, with which such demand might be paid in whole or in part, with intent to delay or defraud his creditors, any justice shall issue a *capias ad respondendum* against the defendant, &c." 2 R. S. G. & H. p. 583.

The affidavit is said to be objectionable, because, as is alleged, it does not state the amount of the indebtedness with any degree of certainty. We think otherwise. The sum due is stated to be 102 dollars and 92 cents, as per bill of items. It is true, the bill foots up 116 dollars and 34 cents, but that does not render the sum alleged on the affidavit uncertain. Properly construed, the affidavit means that the defendant is indebted 102 dollars and 92 cents on the bill of items. The affidavit, in our opinion, is within the substantial requirements of the statute; and that being the case, the motion to dismiss the suit, was correctly overruled.

As we have seen, the third assigned error is, that "the jury, having found that the defendant was not guilty of fraud, the judgment should have been arrested." There is nothing in this assignment. The affidavit being, on its face, sufficient to authorize the writ, the plaintiff was entitled to a trial on the merits. See *Harris v. Knapp*, at the present term.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Lafe Develin and *Geo. A. Johnson*, for the appellant.

John Yaryan, for the appellees.

The Indianapolis, Pittsburgh, &c., R. R. Co. v. Brucey.

THE INDIANAPOLIS, PITTSBURGH AND CLEVELAND RAILROAD
COMPANY v. BRUCEY.

RAILROADS—PLEADING.—A complaint against a railroad company for stock killed by the machinery of the company, will be bad, even after verdict, if it fail to aver negligence, or that the road was not fenced.

APPEAL from the *Hancock* Common Pleas.

HANNA, J.—Suit commenced before a justice, to recover the value of two cows, killed by the rolling stock of said company. The complaint averred that the said cows were unlawfully killed, &c., but did not aver negligence, nor that the road was not fenced. There was no objection taken to the complaint before the justice, nor until after trial on appeal.

The evidence is in the record, and shows that the road was not securely fenced. The evidence on that point was objected to as irrelevant to the issue, but admitted. A motion in arrest, for want of sufficient complaint, was overruled. These two rulings, perhaps, properly present the point urged here, namely, that the suit was not properly commenced, under the statute of 1853, in reference to the liability, in the absence of negligence, of roads not fenced.

The real question presented, then, is, whether the complaint, filed before the justice, was sufficient after verdict.

This question has been already passed upon by this Court. The objection that there was a want of jurisdiction, or of a cause of action, may be raised on appeal. *The President, &c. Co. v. Smith*, 19 Ind. 42.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

John Davis, for the appellant.

David S. Gooding, for the appellee.

The State ex rel., &c. v. Wilkins' Adm'r.

THE STATE *ex rel.* &c. v. WILKINS' Adm'r, &c.

EXECUTION—CLERK.—Where, in the entry of a judgment, by agreement of the parties, it is ordered by the Court that an execution shall issue thereon, but shall not be levied of the defendant's property for a specific period, except in a certain event, it does not thereby become the duty of the Clerk to issue such execution without directions so to do from the plaintiff, his agent or attorney.

APPEAL from the *Vigo* Circuit Court.

WORDEN, J.—This was an action by the appellant against the appellees. The suit was brought upon the official bond of *Wilkins*, deceased, given by him as Clerk of *Vigo* county. The breach alleged is, that in *January*, 1861, the relators recovered a judgment in the *Vigo* Court of Common Pleas, against one *John C. Walter*, by agreement, as follows:

"It is therefore considered, that the plaintiffs recover of the defendant the sum of 328 dollars and 70 cents in damages, together with the costs and charges in this suit, amounting to 10 dollars and 60 cents; and, by agreement of parties, it is ordered that execution issue herein; but the same shall not be levied of defendant's property for 180 days from this date, unless it shall be necessary to continue and perfect a lien on defendant's property."

It is alleged, that, at the time the judgment was rendered, *Walter* had sufficient property, subject to execution, to pay the same, and continued to have for a reasonable time thereafter; "that the Clerk wholly failed and neglected to issue execution during his continuance in office, and that, in *June*, 1861, *Walter* became wholly insolvent, whereby the relators lost their debt."

A demurrer was correctly sustained to the complaint. As a general proposition, the Clerk of a Court is not required nor authorized to issue an execution upon a judgment, without the authority or direction of the party in whose favor it

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is rendered, his agent or attorney. *Lewis v. Phillips*, 17 Ind. 108.

But, it is claimed, that, in this case, it was the duty of the Clerk to issue the execution without further direction, inasmuch as it was ordered by the Court that an execution issue therein. Such, in our opinion, is not the effect of the order of the Court. The effect of the order was to give the plaintiffs therein leave to issue execution, but that a levy be withheld for 180 days, unless a levy became necessary in order to continue or perfect a lien. It was not intended by the order to require an execution to be issued in favor of the plaintiffs, whether they wished it or not. It was altogether optional with them to have the execution issued, or to forego it. If they desired it issued, they should have given the Clerk directions accordingly, as in other cases.

Per Curiam.—The judgment below is affirmed, with costs.

Chambers Y. Patterson, for the appellants.

B. B. Moffatt, for the appellees.

THE OHIO AND MISSISSIPPI R. R. Co. v. BURTON.

CONSTRUCTION OF EVIDENCE.—The decision herein turns wholly upon the construction of the evidence. See opinion at length.

APPEAL from the *Lawrence* Common Pleas.

DAVISON, J.—*Burton* sued the railroad company, alleging in his complaint that the defendant, on the 8th of *January*, 1862, at or near *Georgia*, on the line of her road in the county of *Lawrence*, without leave, unlawfully took 898 cross ties belonging to the plaintiff, of the value of 98 dollars and 70 cents, wherefore he has sustained damage to the amount of

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100 dollars, for which he demands judgment, &c. The defendant answered by a denial. The Court tried the issues and found for the plaintiff, 82 dollars and 25 cents. New trial refused and judgment, &c.

The only question to settle is, does the evidence sustain the finding? Upon the trial the plaintiff, having been sworn as a witness, testified thus: "Prior to *December*, 1861, I had some talk with *Baldwin*, the road-master of the defendant's railroad, by which I was to deliver any quantity he might choose, of good merchantable cross ties, on the line of the road, at such times and places as was convenient, and the defendant was to pay me therefor, on such delivery, 25 cents per cross tie. The ties were to be paid for on delivery. I accordingly delivered 102 cross ties, on the line of the road at the town of *Georgia*, and 229 on said line one mile distant from *Georgia*. After the delivery of the ties, and during the month of *January*, 1861, *William Moffatt*, an engineer of the defendant, took away on the defendant's cars 102 of the ties, and afterwards, in *January*, 1862, he, *Moffatt*, took away 229 of said ties, without my consent, and without paying for the same. After the removal of the ties I saw a portion of them laid down and used on the track of the defendant's road. The defendant did not, when the ties were delivered, or at any time since, pay me for them, or any part of them. This was all the evidence. If the delivery of the cross ties on the line of the road was absolute, so as to vest the property in the defendant, then the plaintiff can not recover. His action should have been in form *ex contractu* and not *ex delicto*. But does a proper construction of the evidence show an absolute delivery to the defendant? The plaintiff, in his testimony, says that he delivered the ties on the line of the road and that defendant took them away without his consent, and without paying for them. Now, is that anything more than saying that he placed the ties on the line of the road, intending

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to deliver them when paid for? He does not say that he delivered the ties to the defendant, and hence it may be readily inferred that he considered them, while on the line of the road, and until he was paid, his property. The lower Court has, it seems to us, construed the evidence correctly, and we are not inclined to disturb its conclusions.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

N. F. Malotte, Thos. R. Cobb and Theo. Gazlay, for the appellant.

Gideon Putnam, for the appellee.

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COX v. HUTCHINGS.

NEW TRIAL—SURPRISE.—Under the law allowing parties to testify, where the plaintiff simply swears to the truth of his complaint, it is doubtful whether the defendant can in any case have a new trial on the ground alone that he was surprised by such testimony of the plaintiff.

NEW TRIAL.—NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative, or where it might not change the result on another trial.

PRACTICE.—An application for a new trial shall be verified.

APPEAL from the *Montgomery* Circuit Court.

PERKINS, J.—Complaint for a new trial. Two grounds are assigned :

1. Surprise at the testimony of the plaintiff, *Hutchings*.
2. Newly discovered evidence.

The case in which the new trial is asked was this :

Cox v. Hutchings.

Hutchings sued *Cox* for 431 dollars, which he alleged the latter owed him for money and services expended and performed by the former, (*Hutchings*,) in purchasing hogs for the latter, (*Cox*.)

Cox answered, the general denial, and a special denial, that *Hutchings* purchased the hogs in question for himself, not for *Cox*, the defendant.

The cause was tried after the act making parties competent witnesses came into force. *Hutchings* was a witness and simply swore to the truth of his complaint, simply swore to his cause of action which had been put in issue by the answer. How the defendant could be surprised, in a legal sense, by the testimony of a party to his cause of action, on which a direct issue, and the only issue in the cause had been formed, is not easily perceived. *Cox* does not say, in his complaint in this case, whether he swore to the contrary of *Hutchings* on the trial or not. See the cases as to surprise cited in 2 G. & H. p. 212, notes 3 b, c, d.

As to the second ground, newly discovered evidence, the complaint is fatally defective, for the reason that the evidence given upon the trial had is not shown.

It is a settled general proposition that a new trial will not be granted on account of newly discovered evidence where such evidence is merely cumulative, or where it might not change the result on a new trial. To enable the appellate Court, therefore, to determine whether the Court below rightly denied a new trial—(the Court that heard the evidence)—that evidence must appear in the record. 2 G. & H. p. 213, note 1. If the application for a new trial is made by motion in term time, to the Court that tried the cause, the evidence, on taking an appeal, is put in the record by bill of exceptions. *Walpole v. Atkinson*, 18 Ind. 434. If the application is made afterwards by complaint, perhaps to a Court that did not hear the original trial, the evidence must, at

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least, according to averment, appear in the complaint, and again before the Court, on the trial, and again in a bill of exceptions after the trial, should there be an appeal to an appellate Court from the judgment upon the trial of the merits. *Stanley v. Peoples*, 13 Ind. 233; *McKee v. McDonald*, 17 Ind. 518; *Crawford v. Martin*, 10 Ind. 370; *Glidewell v. Daggy*, at this term.

2. Whether the complaint for a new trial should necessarily be verified, is not clear from the authorities. It was so held in *McDaniel v. Graves*, 12 Ind. 465; but doubted in *Allen v. Gillum*, 16 *id.* 284, though without noticing the previous case.

We think the complaint should be sworn to. The oath may be some check on groundless applications; but if the objection is not taken of want of verification till after the trial it will be waived.

Per Curiam.—The judgment must be affirmed, with costs.

McDonald & Roache, for the appellant.

S. C. Willson, for the appellee.

HOWARD v. BARBEE et al.

The act of March 17, 1861, (see acts 1861, p. 49,) is construed to require the party, to whom a change of venue is granted, to perfect the same within the time therein limited, and to pay all costs of such change, if perfected, and to pay all costs up to the time when it should have been perfected, if it is not; but, in any event, such change must be perfected within a reasonable time after the order, or the right thereto will be deemed to have been waived, and the cause will remain upon the docket as if no change had been granted.

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APPEAL from the *Tippecanoe* Common Pleas.

HANNA, J.—The only point urged in this case, is, that the Court had no jurisdiction to try it.

The suit was pending at the *June* term, 1862, of said Court, at which term a change of venue was granted to the county of *Carroll*, because of alleged odium attaching to the person and defence of the defendant, and the Clerk was ordered to transmit the papers upon payment of costs, &c. At the next (*December*) term of said Court, the plaintiffs' attorney filed a written statement, reciting the said order, &c., and alleging, that, in *September* and *October*, a term of the *Carroll* Common Pleas had been held, at which said case could have been tried, if the change had been perfected, but that the same had not been done by said defendant, and asking that the case might be docketed, &c. An affidavit was filed by the defendant, resisting said motion, in which he stated, that ten days before the said *December* term, and several times afterwards, he had applied to pay the costs and perfect said change, but the Clerk would not receive said costs, nor transmit the papers, &c., and he was then ready to perfect the same, &c.

The Court ordered the case docketed, and that it stand for trial at said term, &c.

It will be seen, that near six months intervened between the order to change the venue and this order to re-docket the case.

The paper filed by the plaintiff also alleges the fact, (of which we would take judicial notice,) that, in the meantime, a term of the *Carroll* Common Pleas had passed. These facts bring the case within the decision of *Rogers v. Stevens*, 8 Ind. 465, which is decisive of this, unless a different rule should result from the enactment of the statute of 1861, (sess. acts 1861, p. 49,) which provides, that, in changes granted for the cause herein alleged, the "Clerk shall forthwith transmit the papers, and a transcript of the proceedings, to the Clerk of

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the Court to which the venue is changed, the party applying for a change first paying the costs thereof, * * * and the action shall stand for trial at the first term, * * * and if a party, applying for a change of venue, shall fail to perfect the same ten days before the first day of the next term of the Court to which the change is taken, * * * said party shall pay all the costs made in the case up to the time of such failure." The Court did not fix the time within which the change should be perfected.

What is the effect of this statute? Does it authorize the transmission of the papers upon the application of the party seeking the change, notwithstanding his neglect to perfect the same, as therein directed, provided he will pay all the costs that have arisen up to the time of such failure? The law existing previous to the passage of the act now under consideration, provided, that the person obtaining the change should pay the costs occasioned thereby before the papers were transmitted, and, until that was done, the change could not be considered as perfected; and, in the case before cited, it was decided by this Court, that a delay for an unreasonable time to perfect the change, after an order had been granted, would be treated as a waiver of the right to it under the order. In that case, although the papers were filed with the Clerk of the Court to which the change was granted by the first day of the term, yet, as it was not done in time for a trial at that term, and considerable time had intervened, it was held that the delay had been unreasonable, and the right to take the change under the order had closed.

This statute was amended, as above shown, in view of said decision, and perhaps in view of, and to remedy a practice, which had to some extent prevailed, of obtaining an order for a change, which would operate as a continuance, and then failing to perfect the same; or perfecting it at so late a date, although within a reasonable time, as to prevent a trial at the

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first term after obtaining the change. We think it was the purpose of this act to compel the person, who should thus delay a trial, to pay costs, and, by this means, prevent more delay. But we do not believe it was the intention to give the right to a change, after a reasonable time had elapsed, to perfect it after the order had been made.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

McDonald & Roache, for the appellant.

Geo. Gardner, for the appellees.

SMITH *et al.* v. WILEY *et al.*

LIMITATIONS.—Where infant wards, soon after the appointment of their guardians, remove from this State, and continue to reside abroad, the statute of limitations does not run against them until they return. 2 G. & H. 161, § 216.

APPEAL from the *Switzerland* Circuit Court.

HANNA, J.—The appellants were, in 1834, the wards of Wiley, who was their guardian, and as such applied, in *November* of that year, to the proper Court, for leave to sell the real estate of his said wards, that the proceeds might be vested in other lands. It is averred that the Court ordered the sale of said lands, and appointed one *Kelso* a commissioner to make said sale; that he sold, without giving notice to said guardian, and in 1836 reported said sale, and that he had paid the amount of money and notes to said guardian; and that the sale was not confirmed, nor any one appointed to make a deed; but that in 1839 a deed reported by said *Kelso*, who

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assumed, without any authority, to make the same, was approved by the Court; that said land was appraised at 1,000 dollars and sold for 700 dollars; that said *Wiley* went into and is yet in possession; that said plaintiffs, then being infants, soon after he was appointed guardian, removed to and yet reside in *Illinois*; that he has never settled his trust as guardian, nor vested said funds in other lands; that he induced persons to not bid upon said lands; that said fact and the fact of the manner in which he was to vest the funds derived from the sale of said lands were not known to said plaintiffs, but were concealed from them till the 4th of *July*, 1858. This suit was commenced in about three months thereafter.

A demurrer was sustained to the complaint on the ground that the suit was barred by the statute of limitations.

The decision was clearly wrong, as the statute expressly excepts non-residents from its operation. 2 G. & H. p. 161. The complaint shows the plaintiffs were non-residents. This being the case, it is not necessary to discuss other questions raised, as to concealment and fraud, and the time of this discovery," &c.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

John Dumont, for the appellants.

BECKWITH v. THE STATE ex rel., &c.

CRIMINAL LAW AND PRACTICE.—As to what will constitute a sufficient affidavit for surety of the peace, see the opinion.

APPEAL from the *Bartholomew* Circuit Court.

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Beckwith v. The State ex rel., &c.

DAVISON, J.—This was a prosecution instituted before a justice for surety of the peace. The affidavit, upon which the prosecution is based, is in these words:

“STATE OF INDIANA, *Bartholomew county, sct.*

“*Isaiah Watkins* swears, as he verily believes, that he has just cause to fear, and does fear, that *William Beckwith* will injure his person by violence, and that he makes this affidavit only to secure the protection of the law, and not from anger or malice.

ISAIAH WATKINS.

“Subscribed and sworn to before me, this 14th of *February*, 1868.

JOS. E. MITCHELL, J. P.”

The justice gave judgment against the defendant, and he appealed. In the Circuit Court the defendant moved to quash the affidavit, but his motion was overruled, and thereupon the cause was submitted to a jury, who found thus:

“We, the jury, find that *Isaiah Watkins*, the relator, has just cause for the fears expressed in his affidavit.”

Motion for a new trial denied, and judgment entered in accordance with the verdict.

The affidavit, in this case, is said to be defective, because the relator does not swear positively, but as he “verily believes.” The statutory form of an affidavit of this sort does not contain the words, “verily believes;” 2 G. & H. p. 643; but that form need not be literally pursued. *Id.* p. 642, sec. 31. As we construe the affidavit before us, the term, “verily believes,” may be applied to its first averment, viz: “that he has just cause to fear,” and that to the residue of the affidavit, the relator swears positively. Now, this construction being correct, the affidavit is, it seems to us, within the substantial requirements of the statute. *Id.* p. 640, sec. 22. It would, no doubt, be well to pursue the prescribed form; but in looking into the record, we are satisfied that the cause was

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fairly tried, and that the defect in the affidavit, if it be one, was not of such a character as in any degree "to tend to the prejudice of the substantial rights of the defendant upon the merits." *Id.* p. 404; *Conklin v. The State*, 8 Ind. 458.

Per Curiam.—The judgment is affirmed, with costs.

S. Stansifer and *F. T. Hord*, for the appellant.

Oscar B. Hord, Attorney General, for the State.

RIGSBEE v. TREES et al.

CORRECTION OF CONTRACT—PRACTICE.—Under the provisions of § 71, 2 G. & H. 98, a mistake in a promissory note, in the amount for which the same is given, may be reformed, and judgment rendered for the amount due upon the note as reformed, in one and the same action

APPEAL from the *Shelby* Circuit Court.

DAVISON, J.—The appellees, who were the plaintiffs, sued *Rigsbee*, alleging in their complaint that the plaintiffs are the surviving partners of the late firm of *Jacob Mull & Co.*, and that on *January 1, 1861*, the defendant executed to said firm a promissory note in this form :

"\$271.39.

Manilla, Indiana, January 1, 1861.

"One day after date I promise to pay to the order of *Jacob Mull & Co.*, 239 dollars and 39 cents, value received, without any relief whatever from appraisement laws.

"ANDREW J. RIGSBEE."

That in drafting said note a mistake occurred in the written portion of it in this, that the note is made to read "239

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dollars and 39 cents," when it should have read, "271 dollars and 39 cents," and that the mistake was not discovered by the plaintiffs until the note was taken to and left with their attorney for suit; that the firm of *Jacob Mull & Co.* consisted of the plaintiffs and *Jacob Mull*, who died at *Rush* county in this State, on *May* 15th, 1861, intestate, leaving the plaintiffs his surviving partners; and that the note is due and remains wholly unpaid. Wherefore the plaintiffs demand judgment for the correction of the mistake, and for 300 dollars, and for other proper relief, &c.

Proper issues having been made, the cause was submitted to the Court, who found that the note was executed on the 1st of *January*, 1861; that it was intended and meant to be for 271 dollars and 39 cents, and the Court also found for the plaintiffs 292 dollars and 17 cents; and, thereupon, rendered final judgment as follows: "It is, therefore, considered by the Court that the plaintiffs do recover of the defendant the said 292 dollars and 17 cents, so found as aforesaid, together with their costs, &c."

Defendant moved for a new trial on two grounds: 1. The judgment is not sustained by the evidence. 2. It is contrary to law; but his motion was overruled and he excepted.

This decision is said to be erroneous; because, as is alleged, the Court had no authority to reform the note in the mode indicated in the proceedings. The code says: "When the plaintiff desires to correct mistakes in title papers, or other instruments of writing, a separate action may be brought therefor, or mistakes in such title papers or other instruments of writing may be corrected in any other action, when such correction would be essential to a complete remedy." 2 R. S. p. 43, sec. 71. Promissory notes are very clearly embraced within the phrase, "instruments of writing," as used in this provision, and, under it, may be corrected; but it is insisted that the Court should have first entered up a judgment re-

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forming the note, and then have allowed it, as reformed, to be given in evidence on the trial. We perceive no valid reason for that precise mode of practice, neither the letter nor spirit of the statute requires it. It is enough if the Court, as in this instance, find the mistake and correct it, and then render a final judgment in the case in accordance with such finding.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

M. M. Ray and B. F. Davis, for the appellant.

Davis, Wright & Green, for the appellees.

GILL *et al.* v. THE STATE *ex rel.* HEUST.

APPEAL from the *Pulaski* Circuit Court.

Per Curiam.—In this case there was no exception taken to any ruling of the Court below, nor is any question properly presented by the record for our decision.

The judgment is affirmed, with costs and five per cent. damages.

G. T. Wickersham, for the appellants.

Pratt & Baldwin, for the appellee.

WOODHULL v. FREEMAN.

PRACTICE—FORMER RECOVERY.—In an action to foreclose a mortgage, where the defendant, who is a non-resident of the State,

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appears and pleads in bar a former decree in foreclosure of the same mortgage, if it be shown by evidence that he had no notice, actual or constructive, of the pendency of the suit in which that decree was rendered, or if it appears affirmatively, or by reasonable inference, from the record of the proceedings in which that decree was rendered, that he had no such notice, then such decree will be a nullity, and will constitute no bar to the second suit.

APPEAL from the *Porter* Common Pleas.

PERKINS, J.—The question in this case may be presented by stating the pleadings to have been thus: *Freeman* filed a complaint for the foreclosure of a mortgage executed by *Woodhull*. The proper exhibits were made and filed. The defendant answered, setting up a former recovery, in the same Court in which the then suit was pending, making a copy of the proceedings and judgment a part of his answer. The plaintiff replied that the prior judgment, set up in the answer, was a nullity, in this, that the defendant therein, *Woodhull*, was a resident of the State of *New York*, and a non-resident of the State of *Indiana*; that he was not in any manner notified of the pendency of the suit; that he did not appear, and that judgment was rendered against him by default.

Trial by the Court, judgment for the plaintiff.

If the former judgment was rendered against *Woodhull* without notice, actual or constructive, and appears by the record to have been so rendered, it did not merge the mortgage, was, in fact, void, and could not bar another action upon the mortgage; and such would be the case where it was legally proved that no notice was given. The mortgage upon which the former judgment was based commenced as follows: "*Richard W. Woodhull*, of ——— county in the State of *New York*, by *Nathaniel K. Strong*, his attorney in fact, mortgages," &c.; and it was signed and acknowledged by *Strong* as the attorney of *Woodhull*. It was dated *March 7, 1860*. This mortgage was made a part of the complaint. Other

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persons, not interested in the mortgaged premises, however, were made defendants in the complaint, with *Woodhull*, the mortgagor of the land, and owner of the equity of redemption.

The following summons, and the return thereon, evidenced the only notice given of the pendency of the suit:

"The State of *Indiana*—to the Sheriff of *Porter* county: You are hereby commanded to summon *Richard W. Woodhull*, *Tighlman A. Hogan*, *Nathaniel K. Strong*, *Aaron Lytle* and *Richard Lytle* to appear in the *Porter* Common Pleas Court on the second day of the next term thereof, to answer the complaint of *Lorenzo Freeman*, and of this summons make due return. Witness the Clerk, &c., *August 28, 1861.*"

Sheriff's return: "Served on all the within named defendants by reading, and on *N. K. Strong*, attorney in fact for *Woodhull.*" Signed by the officer.

Interpreting this return in the light of the facts, appearing in the complaint and record, that *Woodhull* was, one year before, a non-resident, and that there is nothing in the record showing any change of residence, or any temporary appearance in *Indiana*, we think the inference from the whole record is that *Woodhull* was not notified of the pendency of the suit; that the record is not silent, but speaks to that effect. The case also appears to be one not falling within that class where notice to an agent suffices. 2 R. S. p. 57, § 30.

We do not see how the defendant is injured by this suit. He will not have to pay the costs of the former, and it is important, if a sale must be had of the mortgaged premises, that the purchaser shall obtain a good title.

Per Curiam.—The judgment is affirmed, with costs and 1 per cent. damages.

James Bradley, *Charles J. Thompson* and *H. A. Gillett*, for the appellant.

Landry's Adm'r v. Durham et al.

LANDRY'S ADM'R v. DURHAM *et al.*

AMENDMENTS—PRACTICE.—Amendments may be made in the complaint, with the leave of the Court, after the trial is begun, if they are only designed to make the complaint more certain and specific, and do not add a new cause of action, so as to injure the defendant if compelled to proceed.

PRACTICE.—Under a plea of total failure of consideration, a partial failure may be proved and made available.

APPEAL from the *Marion* Common Pleas.

PERKINS, J.—*George Durham* and four others sued *Henry P. Todd*, administrator of the estate of *Daniel Landry*, deceased, averring that one *Ruth Higginbotham*, widow of *James Higginbotham*, had in her hands about 1,100 dollars belonging to plaintiffs; that she afterwards married *Daniel Landry*, and “loaned to him, at different times, some before and some after marriage, in all the sum of 1,050 dollars, for which sum of money [to the amount of 950 dollars] said *Landry* executed his note of hand payable to the children of said *James Higginbotham*, when the youngest one, *Eliza Jane*, should become 18 years of age, [and he also borrowed 100 dollars afterwards, and indorsed it on said note, making 1,050 dollars.”]

The parts of the complaint included in brackets were inserted, by leave of the Court, on the trial to make the averment conform to the evidence. We do not see that the defendant could have been injured by the amendment. It only specified two items of which the sum sued for was made up, as evidenced by the note.

The answer of the defendant consisted of the general denial, want of consideration, and payment. Reply in denial of the second and third paragraphs. Trial by jury, verdict and judgment for plaintiffs.

An answer of the statute of limitation of six years was

Landry's Adm'r v. Durham et al.

rightly held bad on demurrer, the demand sued for being evidenced by written instrument.

The evidence upon the trial touching the existence of the note, averred in the complaint to be lost, and the consideration of it, being the matters of controversy, tended to show that *Ruth Landry*, formerly *Ruth Higginbotham*, was married to *Daniel Landry*; that a few weeks before she was married she loaned him 350 dollars and took his note; that soon after the marriage she loaned him 600 dollars more, and took his note for that sum; and that afterwards these two notes were canceled, and a note for 950 dollars substituted; that afterwards she loaned *Landry* 100 dollars more, of which a memorandum was made upon the 950 dollar note. The note was made payable to the children of *James Higginbotham*, her former husband. It further tends to show that the money she loaned *Landry* was received by her as follows: before her first husband went to the poor farm he had sold land for 600 dollars, and it was out of this that she loaned *Landry* the 350 dollars. The 600 dollar loan was money he saved while on the poor farm, and it would seem that she may have received some 400 dollars more of her husband's money from *John McFall*. The evidence is somewhat contradictory, but this was for the jury and Court below.

Her husband, *Landry*, destroyed the note against her remonstrance shortly before he died.

She promised her first husband, before his death, to save his property for his children.

Taking one view of the evidence, which the jury may have taken, there is no variance between the complaint and the proof. The complaint alleges that some of the money was loaned before, and some of it after, her second marriage, though perhaps the fact is immaterial.

The 1,050 dollars included in the note may have been no more than the proportion of *Higginbotham's* estate belonging

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to his children. The evidence is unsatisfactory. The evidence, if true, and the jury may have believed it, shows that *Landry*, after his marriage with *Ruth Higginbotham*, gave a note payable to the children of her former husband, and that *Ruth* received and held it for them. Now, they knew better than any body else how much those children were entitled to, and were both interested in making the amount as small as possible, and they deliberately fixed it at 1,050 dollars. We say deliberately, because their attention was called to it at every new loan and change of notes, and *Ruth* says the note finally given was without interest, and run till the children were all eighteen, as till then they might be with her and her husband—thus distinctly recognizing the money as theirs.

The point is discussed in the case, whether under an answer of total failure of consideration, a partial failure may be proved and made available as a defence to the extent of such proof.

The provision of the code of 1852, on this point, is the same as was that in former codes, and under those it was held that a partial failure might be taken advantage of under a plea of total failure of consideration. We think that line of decision should be followed. See *Wynn v. Hiday*, 2 Blackf. 123, and note.

The Court on the trial gave several instructions to the jury, some of which were correct.

In the motion for a new trial the ground of error in instructions was thus stated: "The instructions given by the Court are contrary to law."

The assignment of error on the point in this Court is thus: "The Court erred in instructions given to the jury."

We have so often decided that such assignments of error would not be noticed that we need not restate the argument, and authorities, not only in our own State but in others, justifying the practice.

Louis' Administrator v. Arford.

Per Curiam.—The judgment must be affirmed, with costs and 1 per cent. damages.

S. Major, for the appellant.

R. L. Walpole, for the appellees.

LOUIS' Administrator v. ARFORD.

PLEADING.—An answer which goes to a whole cause of action, but only recites facts which constitute a bar to a part thereof, is bad.

APPEAL from the *Ripley* Common Pleas.

WORDEN, J.—This was an action by the appellant against the appellee, to recover the price of 400 bushels of corn, alleged to have been sold and delivered by the plaintiff's intestate to the defendant, and 240 dollars in money, alleged to have been deposited, by the plaintiff's intestate, with the defendant.

The defendant pleaded, amongst other things, to the whole cause of action, a set-off of 59 dollars and 74 cents, and to the whole of the claim for money, that he received 50 dollars from the deceased, which he was to keep until the deceased returned from the army, and if he never returned, the defendant was to pay the money to *Susannah Arford*, which he has done, the deceased having died before returning.

These paragraphs were demurred to, but the demurrer was overruled, and exception taken. There was final judgment for the defendant.

The demurrer should have been sustained, for the reason that the paragraphs undertook to answer more than the facts set up would bar.

Per Curiam.—The judgment below is reversed, with costs.

E. P. Ferris, for the appellant.

John G. Berkshire, for the appellee.

Webb v. The State.

SOWLE v. THE STATE.

CRIMINAL LAW AND PRACTICE.—On the trial of an indictment for retailing without license, it is error to allow the State to prove, that, in an adjoining room to that in which the liquor was sold, the defendant kept a billiard table.

APPEAL from the *Steuben* Circuit Court.

Per Curiam.—The indictment, in this case, charges that the defendant, on, &c., at, &c., not being licensed, &c., did sell to one *Peter Cluch* intoxicating liquor by a less quantity than a quart, to-wit: one gill, for ten cents, contrary, &c. Verdict and judgment against the defendant. Upon the trial, the Court, over the defendant's objection, allowed the State to give evidence tending to prove, that the defendant, in a back room of the house in which the liquor was sold, kept a billiard table. This ruling was erroneous. The evidence, to say the least of it, was not pertinent to the case, and may have misled the jury in estimating the quantum of punishment.

The judgment is reversed, with costs. Cause remanded.

D. E. Palmer, for the appellant.

Oscar B. Hord, Attorney General, for the State.

WEBB v. THE STATE.

CRIMINAL LAW AND PRACTICE.—An affidavit is substantially good, which charges that the defendant, "on, &c., at, &c., did feloniously steal, take away, lead, ride, and drive away, one dun-colored horse," &c.

CONTINUANCE.—An affidavit for a continuance, in which the affiant

Webb v. The State.

can not state the names of witnesses he wants, nor where they reside, or can be found, is insufficient.

APPEAL from the *Marion* Common Pleas.

Per Curiam.—Prosecution against *Webb* for larceny in stealing a horse. He was first arrested and committed upon an affidavit made before Mayor *Cavin*, of *Indianapolis*. *Smithers*, who made the affidavit, signed it below the jurat, between it and the name of the Mayor, who administered the oath to *Smithers*, and certifies to its having been taken. This is a mere informality.

The information charges that the defendant led and rode away the horse, being the personal goods and property of, &c.

It is urged that the defendant could not have both led and rode the horse away, and that the horse was not goods. The objection is insufficient.

An affidavit was made for a continuance; but the affiant did not know the names of the witnesses he wanted, nor where they resided, or could be found. It was not error to refuse the continuance.

On the evidence, the conviction can not be disturbed. The horse had been taken in the night from the owner's stable; the defendant was soon after seen in possession of it, and gave no reasonable account, &c.

The judgment is affirmed, with costs.

J. Milner, for the appellant.

Oscar B. Hord, Attorney General, and *John C. Bufkin*, District Attorney, for the State.

Schrader v. Wolflin.

SCHRADER v. WOLFLIN.

MORTGAGED CHATTELS, SALE OF.—The equity of redemption of mortgaged chattels may be sold on execution, and the sheriff is entitled, for that purpose, to levy upon and take possession of the same.

TENDER—PRACTICE.—It is doubtful whether proof of tender is admissible under the general denial.

SAME.—Where chattels have been wrongfully replevied from a sheriff, and the party replevying, in answer to an action on the replevin-bond, attempts to prove that, "after the dismissal of the replevin suit, he offered to return the chattels to the sheriff, which he refused to accept because instructed so to do by the attorney of the execution plaintiff," such proof is inadmissible, because insufficient to establish a legal tender.

TENDER.—A tender, sufficient to discharge a contract, must be so complete and perfect as to vest the absolute property in the person to whom it is tendered.

MEASURE OF DAMAGES.—In an action upon a replevin-bond, to recover the value of chattels wrongfully replevied, the measure of damages is the value of the goods, and not the price at which the defendant may have sold them.

APPEAL from the *Vanderburgh* Circuit Court.

WORDEN, J.—This was an action by *Wolflin* against *Schrader*, upon a replevin-bond. Judgment for the plaintiff.

The facts are briefly these:

Schrader held a chattel mortgage from one *Saner*, on certain personal property, to secure the payment of a debt. *Wolflin*, as sheriff, held two executions against *Saner*, by virtue of which he levied upon the same personal property. *Schrader* replevied the property from *Wolflin*, and had the same delivered to him, having executed the bond in suit. *Schrader* suffered a non-suit in the action of replevin. There does not appear to have been any breach of the condition of the mortgage at the time the property was levied upon.

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The equity of redemption might have been sold in execution, and for that purpose, the sheriff had a right to levy upon and take possession of the property. *Heimberger v. Boyd*, 18 Ind. 420.

On the trial, the defendant offered to prove that, after the dismissal of the replevin suit, "he offered to return said property to the said sheriff, and that the sheriff refused to accept it because instructed to do so by the attorney of the execution plaintiff." This evidence was rejected.

There was no plea of tender, and it is questionable whether the matter thus offered, could be given on evidence under the general denial; it would seem to have been new matter that required pleading. But, passing by this question, it seems to us, that the evidence, as offered, fell short of making out a valid tender.

We see no reason why a tender, in this case, should not stand upon the same ground as a tender in case of an ordinary agreement for the delivery of chattels. Says *Mr. Parsons*: "These two things go hand in hand. If the contract and its obligation are discharged by the tender, the property in the chattels passes by the tender; and, on the other hand, if the property passes by the tender, the contract is discharged. And, therefore, whenever a tender would discharge the contract, it must be so complete and perfect as to vest the property in the promisee, and give him, instead of the *jus ad rem*, which he loses, an absolute *jus in re*." 2 Pars. Cont. p. 160.

Tested by this rule, it is apparent, that the evidence offered was wholly insufficient. It does not appear, by the evidence offered, where the property was at the time the offer of return was made; nor was evidence offered to show that the property was turned out to, or set apart for, the plaintiff; nor were any facts offered in evidence, to show—had this been the case of an ordinary agreement for the sale of chattels—

Schrader v. Wolfen.

that the title to the property would have vested in the plaintiff, and the contract thereby have been discharged. There was no error in excluding the evidence as offered.

The defendant further offered to prove, that, immediately after he got possession of the property on the writ of replevin, he advertised the same for sale at public auction, and thus sold the same in good faith, and the price for which the same was sold, and the costs attending the sale; but this evidence was also rejected. In this ruling we think no error was committed.

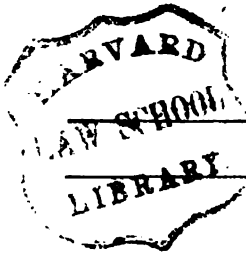
The price at which the defendant sold the goods was not the criterion for the measure of damages. The value of the goods would ordinarily form the proper criterion of measuring damages for their non-delivery.

In this case, the property in the hands of the sheriff was subject to the lien of *Schrader*, by virtue of his mortgage. Had the levy not been made, *Schrader* might undoubtedly have sold the property on his mortgage; but he could not, by making such sale, prejudice the rights of the execution plaintiff. Had the property been sold on the executions, it might have brought more than at the sale as made by *Schrader*. It seems to us, that the defendant can not complain of the rule of damages adopted in this case, which was, as we gather it from the facts that appear, to estimate the property at its value, deducting therefrom the amount of the debt secured to *Schrader* by his mortgage, giving the plaintiff the overplus, which was less than the executions on which the levy was made.

Per Curiam.—The judgment is affirmed, with costs, and 1 per cent. damages.

James E. Blythe and P. Maier, for the appellant.

Asa Iglehart, for the appellee.



Raymond v. Williams et al.

RAYMOND v. WILLIAMS *et al.*

DEPOSITIONS.—Depositions can not be taken during the term of the Court in which the cause is pending without the agreement of the parties, and, if taken without such agreement, they may be suppressed.

SAME.—Where a notice to take depositions recites that the taking will be commenced on a certain day, and continued from day to day thereafter until completed, an adjournment for a longer time will be unauthorized, and will subject the depositions so taken to suppression, unless the opposite party appear and waive such objection.

APPEAL from the *Wayne* Circuit Court.

DAVISON, J.—The appellees, who were the plaintiffs, sued *Raymond* upon a note, for the payment of 804 dollars. The note was payable to *George Murphy*, who, by indorsement, assigned it to the plaintiffs, by the style of "*Williams, Murphy and Benedict.*" The Court tried the issues, and found for the plaintiffs, and, having refused a new trial, rendered judgment, &c.

It appears, in the record, that the plaintiffs notified the defendant that they would, on the 29th of *January*, 1863, between the hours of 9, A. M. and 4, P. M., at the office of *William C. Ward*, No. 29 *Wall* street, in the city of *New York*, proceed to take the depositions of *George Murphy* and others, and continue from day to day until all were taken, &c. On the 29th of *January*, the day named in the notice, the plaintiffs proceeded at the place designated, before a notary public, to take the depositions, and, having continued therein for some time, the further taking was adjourned to the 2d of *February*, when it was completed. The defendant was not present on any of the above named days.

The defendant moved to suppress the depositions thus taken, on two grounds:

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1. The depositions were taken during term of the *Wayne* Circuit Court, without the agreement of the defendant.

2. The examination of witnesses was not continued from day to day, but adjourned from the 29th of *January*, 1863, to the 2d of *February*.

The code says: "In all actions, depositions may be taken by either party in vacation, immediately after the service of the summons, without any order of the Court, and in term time, by the agreement of the parties." 2 R. S. G. & H. p. 175, sec. 250. Here the depositions were taken on the 2d day—first *Monday*—of *February*, 1863, which was during the term of the Court in which this action was pending; and no agreement, that they might be taken in term time, existed between the parties. It is, therefore, evident, that the taking of these depositions, without such agreement, was in conflict with an essential requirement of the statute.

The second ground of objection is equally well taken. The plaintiffs, having notified the defendant that they would continue from day to day, were bound to comply with the terms of the notice; and the adjournment, in this instance, from the 29th of *January* to the 2d of *February*, being unauthorized, the depositions were inadmissible as evidence in the cause. The motion to suppress should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Develin & Johnson, for the appellant.

Peelle & Wilson, for the appellees.

Fromm v. Leonard.

FROMM v. LEONARD.

PRACTICE.—Where the general verdict is not materially inconsistent with the special findings of the jury, and the latter are responsive to the interrogatories, the Court should render judgment upon the verdict.

APPEAL from the *Carroll* Common Pleas.

WORDEN, J.—This was an action by *Leonard* against *Fromm*, to recover an account for several years boarding and lodging. The amount claimed by the plaintiff was 836 dollars. The defendant pleaded, amongst other things, a set-off, amounting to 552 dollars and 37 cents.

There is no controversy as to the correctness of the set-off. The cause was tried by a jury, who returned the following answers to questions propounded, together with a general verdict, viz:

Questions propounded to the jury:

1. "State at what time defendant commenced boarding at plaintiff's, and the time he quit.
2. "State what the boarding was worth at the time the defendant commenced boarding.
3. "State whether there was a contract between the parties at any time during the defendant's stay with the plaintiff, that the defendant should pay a higher price at any subsequent time than what board was worth at the time he commenced boarding; if so, state the price agreed upon.
4. "State how long a time the defendant was absent in the year from the boarding house, every year during the time he stayed with plaintiff, and also state the deduction he is entitled to for absent time.
5. "State what credit the defendant is entitled to, and what amount he proved in his set-off."

Answers of jury:

 Fromm v. Leonard.

"Ans. to question 1. *August 20th, 1850. Quit June 25th, 1856.*

"Ans. to question 2. 2 dollars and 25 cents per week.

"Ans. to question 3. No contract.

"Ans to question 4. Two and a half months per year.
Deduction 2 dollars and 25 cents per week.

Whole deduction.....	\$185 00
	552 37

Defendant's account.....	\$687 37
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Plaintiff's account.....	682 50
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Balance due defendant.....	\$4 87
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"We the jury, find for the defendant, and that he is entitled to, the sum of 4 dollars and 87 cents.

"J. C. TODD, Foreman."

On this finding, the Court, on motion, rendered judgment in favor of the plaintiff for the sum of 124 dollars and 73 cents. Exception was duly taken.

We are unable to discover any ground on which the judgment can be sustained. The general verdict is not, in any manner, inconsistent with the special findings. Boarding, from *August 20th, 1850, to June 25th, 1856*, at the rate determined by the jury, would perhaps amount to a dollar or two more than the amount computed by the jury. So would the deduction to be made from that time, estimating it two and a half months per year, amount to more than the sum computed by the jury. If any error occurred in the computation, it consisted in finding too small a sum as the balance due the defendant. But the computation was correct enough for all practical purposes.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded, with instructions to the Court below

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to render judgment in favor of the defendant for the amount found due him by the jury.

George Gardner and F. J. Mattler, for the appellant.

Cox v. MATTHEWS *et al.*

APPEAL from the *Tippecanoe* Circuit Court.

Per Curiam.—The judgment in this case is reversed, for the reasons given in *Headley v. Matthews et al.*, 19 Ind. 222—the questions arising in the record of each case being similar.

The judgment is reversed, with costs.

Daniel Mace, for the appellant.

STEVENS v. THE STATE.

APPEAL from the *St. Joseph* Circuit Court.

Per Curiam.—The only error assigned on the original transcript in this case, is shown to have no foundation in point of fact by the perfected record.

The judgment is affirmed.

McDonald & Roache, for the appellant.

Oscar B. Hord, Attorney General, for the State.

Baker v. Horsey.

BAKER v. HORSEY.

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136	15
21	246
150	656

PRACTICE.—An objection to the form of a judgment in replevin, in order to be available here, must have been first brought to the attention of the Court below in the proper manner.

APPEAL from the *Martin* Circuit Court.

PERKINS, J.—*Baker* sued *Horsey* to recovery a steamboat, viz: the "*Miles*."

The defendant answered by the general denial of the plaintiff's complaint, and, specially, that he, the defendant, was, at the time of the commencement of the suit, the owner and rightful possessor of the boat.

Trial by the Court, finding for defendant, and that the value of the boat was 800 dollars; and, also, that the defendant had sustained 1 cent in damages by its detention by the plaintiff. A motion for a new trial was overruled, and judgment was rendered as follows:

"It is therefore considered by the Court that the defendant have return of the property mentioned in said complaint, viz: the steamboat *Miles*, and in case a return thereof can not be had that the defendant recover of the plaintiff said sum of 800 dollars, the value of said boat assessed as aforesaid; and it is further considered that the defendant recover of the plaintiff 1 cent, his damages for the detention of said boat, together with his costs and charges herein laid out and expended, taxed at," &c.

There was no exception below to the form of the judgment. It is contended that the judgment is for the wrong party on the merits, and is wrong in form under the statute.

Baker, the plaintiff, claims title to the boat as purchaser of it on execution as the property of one *Wilson*, but we think the evidence tends to establish the proposition that *Horsey*, the defendant, was, at the time of the sale, the equitable

Baker v. Horsey.

owner of the boat, and that the purchaser at the sale had notice of *Horsey's* title.

As to the form of the judgment, and the objection now first raised to it, we will simply quote the rulings of the Court of Appeals of *New York* in *Ingersoll v. Bostwick*, 22 N. Y. Rep (1860) p. 425. That was a replevin suit, and the Court of Appeals ruled :

"1. That to raise a question of law, an exception must be taken and set forth in the case.

"2. That the judgment, which should have been in the alternative for the return of the property or its value, is for the value absolutely, and does not conform to the report of the referee, and is an irregularity but to be corrected by the Court of original jurisdiction, and not reviewable on appeal," where a correction had not been applied for and refused below, and exception taken. Touching the manner of rendering judgment in replevin suits, this Court held that the question as to whether the property could be returned was not one to be settled by the verdict of the jury, but it is intimated that it should be by the Court, and that the determination should be expressed in the judgment. *Plant v. Crane*, 7 Ind. 486. But in *New York*, whose code we adopted, it is held that the judgment should be in the alternative, and the question of return thereby left with the party and the sheriff. 22 New York Court of App., *supra*, and 5 Seld. 470; *id.* 559; 23 Barb. 240; 19 *id.* 479; 17 *id.* 446; 28 *id.* 157. See and compare the following sections of our code: 2 G. & H. p. 206, § 389; *id.* p. 219, § 374; *id.* p. 230, § 408; *id.* p. 231, § 411, sub. div. 4.

Per Curiam.—The judgment below is affirmed, with costs.

John Baker, for the appellant.

Newton F. Malotte and *Thomas R. Cobb*, for the appellee.

Windle v. Canaday et al.

WINDLE v. CANADAY et al.

ESTOPPEL.—Representations, by the payer of a note, that it is valid, and he has no defence against it, made to a purchaser of such note after he has become the owner thereof, do not operate as an estoppel against the payer, nor can such representations, repeated by the purchaser thereof to any person to whom he may sell the same, have such effect in favor of such second purchaser.

APPEAL from the *Henry* Common Pleas.

HANNA, J.—Suit on a note. Answer, among other things, that the note was given in part consideration for the purchase of a patent right, &c., concerning the utility and value of which certain representations were made, which are specifically set forth, and alleged to have been false and fraudulent. Reply to that part of the answer above noticed that, before the purchase of the note by the plaintiffs, said defendants stated to one *Cook*, he being at that time the owner of the note, that it was valid and he had no defence to make to the same, &c., which statement said *Cook* repeated to the plaintiffs at and before they purchased.

The complaint shows the note was payable to one *Newbrough*, who assigned it to *Cook*, and he to the plaintiffs.

A demurrer to the reply was overruled, which presents the only point in the case. The ruling was erroneous. The statement made by *Windle* to *Cook*, after the latter had become the owner of the note, could not have influenced him in purchasing the same, and therefore there was nothing to rest an estoppel upon. As the maker made no statement to the plaintiffs calculated to influence them in acquiring title to the note, he is not estopped by this statement to a third person from setting up a defence. *Jones v. Dorr*, 19 Ind. 384. If *Cook* had been in a position to enforce the collection of the note, because of an estoppel based upon representations made by the maker before *Cook* became the holder thereof, we do

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not decide that he could not have transferred a clear title to an assignee; but that point is not before us. See *Ray v. McMurtry*, 20 Ind. 808.

The demurrer should have been sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

James Brown, for the appellant.

Wm. F. Walker, for the appellees.

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142 249

PRACTICE—WAIVER.—Error alleged to have been committed in sustaining a demurrer to a pleading is waived by amending the pleading.

RULE 30.—Unless a bill of exceptions contain the words, "this was all the evidence given in the cause," the presumption that there was other evidence will not be excluded.

APPEAL from the *Madison* Circuit Court.

DAVISON, J.—The appellees, who were the plaintiffs, on *January* 16, 1858, brought an action in said Court against *Patrick* on two promissory notes, which read thus:

"\$100.00 *Indianapolis, March* 4th, 1856.

"On or before the 25th of *December*, 1856, I promise to pay *John D. Jones, William Becket, Jonathan Ridenour* and *James Blake* 100 dollars, with interest from date, for value received.

"PALMER PATRICK."

"\$150.00 *Indianapolis, March* 4th, 1856.

"On or before the 25th of *December*, 1857, with interest

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from date, I promise to pay *James Blake, Jonathan Ridenour, John D. Jones* and *William Becket* 150 dollars, for value received.
PALMER PATRICK."

At the *March* term, 1858, the defendant answered by three paragraphs, to each of which a demurrer was sustained and exceptions were taken; but as the grounds of these exceptions are not pointed out in the appellant's brief, the rulings upon the demurrers will not be further noticed. Afterwards, at the *March* term, 1854, the defendant filed another answer which contains: 1. A general denial; and 2. A special paragraph as follows: "The notes sued on, together with another note which fell due *December* 25th, 1858, were given in consideration that the plaintiffs would, on said 25th of *December*, 1858, or concurrently with the full payment of said purchase money, convey to the defendant certain real estate, as described in a bond between the parties, which bond is herewith filed, &c. And the defendant avers that the plaintiffs have never conveyed, or offered to convey, said real estate, &c. To this second paragraph the Court sustained a demurrer, and thereupon the defendant, by leave, &c., filed an amended answer in which he alleges, that the sole consideration for the notes in suit, and another note, was the agreement of the plaintiffs that they would, on the 25th of *December*, 1858, or concurrently with the payment of all the notes referred to in a bond, convey to the defendant certain real estate described in said bond as lot No. 17, and a strip adjoining thereto, in the town of *Pendleton*, which bond bears date *March* 4th, 1856, and was filed with the answer as a part thereof. It is averred that the plaintiffs have not conveyed or offered to convey said real estate to the defendant; and further, they had not, at the date of the notes and bond, or on the 25th of *December*, 1858, nor have they now any title whatever to the same, &c. The plaintiffs demurred to this

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amended paragraph, but the demurrer was overruled, and thereupon they replied by a denial.

The action of the Court in sustaining the demurrer to the second paragraph of the answer is assigned for error, but that assignment is not available. The defendant, having amended the paragraph, after a demurrer had been sustained to it, "waived his right to complain of the sustaining of the demurrer." *Polleys v. Swope*, 4 Ind. 217; *Jay v. The Indianapolis, &c.*, *R. R. Co.*, 17 Ind. 262.

The issues were submitted to the Court, who found specially as follows: That there was due in principal and interest on said two promissory notes 295 dollars; that the plaintiffs have no title to the strip, which is 16½ feet of ground, mentioned in the answer, and that the defendant is entitled to a set off of 45 dollars, the value of said strip, and interest thereon from the date of the notes, which, in the aggregate, amount to 53 dollars; and the Court also found generally for the plaintiffs 242 dollars. Motion for a new trial denied, and judgment, &c.

The appellant contends that the finding is unsustained by the evidence, but this position is not tenable, for the reason that the record does not, as required by rule 30 of this Court, contain the words: "This was all the evidence given in the cause." We have, however, looked into the evidence, as set out in the transcript before us, and are of opinion that it sustains the finding.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Walter March and *W. R. Pierce*, for the appellant.

Austin et al. v. Willson's Executors.

AUSTIN et al. v. WILLSON'S Executors.

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EXECUTORS AND ADMINISTRATORS.—An executor can not lawfully appropriate the assets of the estate of his testator to the payment of his individual debts, and his individual creditor who so receives them, with notice of their character, and of the relations of the debtor to the estate, may be required to repay them to the estate.

PRACTICE IN SUPREME COURT.—Where the evidence tends to sustain the finding of the Court below, this Court will not reverse the judgment for alleged error in overruling a motion for a new trial on the ground of insufficient evidence.

APPEAL from the *Floyd* Circuit Court.

In *February*, 1859, *Hiram Willson* died, testate, and his son, *Byron F. Willson*, and his brother, *Asbury C. Willson*, soon after became executors of his will. The testator, in his lifetime, was a lumber merchant, and, at his death, was the owner of a large quantity of lumber, then situated, in part, in the city of *New Albany, Indiana*, and in part in the town of *Columbia*, near the city of *Cincinnati, Ohio*. Soon after their appointment, his executors sold the entire stock of lumber, to *John Austin* and *Peleg M. Wilcox*, and received their notes, with personal security, for the purchase-money. The notes were made payable to the executors in their fiduciary capacity. Within a few days after such sale, *Asbury C. Willson* became a partner with *Austin* and *Wilcox* in the ownership and sale of said lumber, and immediately removed from the city of *New Albany* to *Columbia*, and assumed the chief management of the business of the partnership, and ceased to take any part in the settlement or administration of said estate, but did not resign his executorship. In 1861, suits were instituted upon said notes, in the names of said executors, and judgments recovered in their favor, as such executors, against the makers and their sureties. Prior to *May 26*, 1862, said *Byron* caused execution to be issued upon said

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judgments, and, on the latter day, said *Austin* and *Wilcox* procured from said *Asbury*, at *Columbia*, where he had ever since continued to reside, the following receipt:

"Received, *May 26, 1862*, of *John Austin* and *Peleg M. Wilcox*, 8,000 dollars, on two certain judgments rendered in the *Floyd Circuit Court*, at its *October* term, 1861, in favor of *Byron F. Willson* and *Asbury C. Willson*, executors of the last will of *Hiram Willson*, deceased, and against *Austin* and *Wilcox*, and others, one-half of said sum to be credited on each of said judgments.

"*ASBURY C. WILLSON, Executor, &c.*"

On *May 28, 1862*, *G. C. Cannon* and *H. O. Cannon*, two of the sureties on said notes, and defendants in said judgments, paid to the Clerk of said Court the principal and interest then due on said judgments, producing the foregoing receipt as part payment, and procured him to indorse on each of said judgments the following entry:

"Received of *G. C. Cannon* and *H. O. Cannon*, amount in full of this judgment, interests and costs, of which 1,500 dollars is on a receipt from *Asbury C. Willson*, executor, &c.

W. W. TULEY, Clerk."

The said *Byron*, as to said 8,000 dollars, insisted that the same constituted no payment on said judgments, disregarded said entry of satisfaction by the Clerk, and sued out executions to collect said sum. Thereupon the appellants instituted this action to enjoin the collection of said sum, and to enforce the entry of satisfaction of said judgments.

Said *Byron*, for separate answer and cross-complaint, averred the facts above stated, touching the origin of said judgments, the association of said *Asbury* with said *Austin*

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and *Wilcox*, his removal from the State, his failure to participate in the settlement of said estate; and he further averred, that the plaintiffs, knowing said facts, and to prevent the collection of said 3,000 dollars, procured the receipt from said *Asbury*, above set out, and that, on June 14th, 1862, said *Asbury* was, by the proper Court, removed from the office of executor, and that he had no longer any authority in relation to said estate, and prayed that said receipt, from said *Asbury*, be canceled, and for general relief. The plaintiffs demurred to the said cross-complaint, and their demurrer was overruled, to which they excepted. There was also a general denial of the complaint. Said *Asbury* answered the complaint by general denial, and admitted the averments in the cross-complaint. The cause was tried by the Court.

The testimony on the trial established the facts hereinbefore stated. It also appeared that said *Byron* had no knowledge of the execution of said receipt, until the same was filed with the Clerk, and never received any part of the sum therein named. Said *Asbury* testified that he sold said lumber as the partner and agent of said *Austin* and *Wilcox*; that he executed said receipt at *Cincinnati*, at the request of said *Wilcox* and *G. C. Cannon*; that they paid him no money; that he owed the firm of *Austin & Co.*, of which he was a member, something near 3,000 dollars, in part for the purchase-money for his interest in the partnership, and in part for money he had collected on sales of partnership property, and converted to his own use; that he had at the time no money on hand, and so informed them; that he gave said receipt in payment of said indebtedness; that they first suggested that mode of payment; that he told them he was not satisfied he had any right to give such receipt, and they said he had. Said *Wilcox* testified that said *Asbury* first proposed to give said receipt; that he, *Wilcox*, thought it would be right, and that he did not know that said *Byron* was the sole

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acting executor; that he did not ask said *Asbury* if he had any money on hand, but supposed he ought to have some on hand, and that about 3,000 dollars was found to be due from him to the other partners, and that before he, *Wilcox*, started to *Cincinnati*, his attorneys gave him a form of receipt from which he there copied the one in question.

Said *G. C. Cannon* testified that the receipt was written at *Willson's*, in *Cincinnati*; that he understood the balance due from *Asbury* to the other partners was upwards of 3,000 dollars; that he can't tell who proposed the receipt; that he did not then know said *Byron* was the sole acting executor; that *Wilcox* told him, before they went to *Cincinnati*, that he wanted to get the money from *Asbury* on such receipt, and that after they got there, money was not mentioned in the interview, but that he may not have heard all that was said.

Finding and judgment for the defendants. Appeal by the plaintiffs.

George V. Hawk and *R. M. Weir*, for the appellants, argue:

Co-executors are regarded in law as an individual person; and the acts of any one of them, in respect to the administration of the effects, are deemed to be the acts of all; for they have all a joint and entire authority over the whole property. Hence, a release of a debt, by one of several executors, is valid, and shall bind the rest. 2 Will. on Ex. 810; 8 Blkf. R. 170; 9 Cow. R. 84; 11 Johns. R. 16; 1 Wend. R. 588; 4 Hill R. 492.

The judgments were recovered by said *Byron* and *Asbury* on notes payable to them, and the judgments thus became a debt to them in their personal capacities. *Savage v. Meriam*, 1 Blackf. 176. They might have sued in their own names, and not in their representative character. *Helm v. Van Vleet*, 1 Blackf. 842. They have full and absolute power over the judgments, not as executors, but in their individual rights. 6 Blackf. 364.

The Toledo and Wabash R. R. Co. v. Daniels.

Thomas L. Smith and *M. C. Kerr*, for the appellees, argue:

The plaintiffs attempt, in this case, to collect a personal demand due to them from a person who is an executor of an estate, by inducing him, as such executor, to enter satisfaction of a judgment due from them to such estate; in other words, by inducing such executor to appropriate the assets of the estate to the payment of his individual debts; and they attempt this with full notice of his relations to the estate. Such transactions are utterly inconsistent with good faith, and in violation of established principles of law. Will. on Ex. 5 Am. ed. 841; *Talbott, Adm'r, v. Dennis*, 1 Ind. 471; *Chandler v. Schoonover*, 14 Ind. 324.

Per Curiam.—This case, we think, clearly falls within the cases of *Talbott, Adm'r v. Dennis*, 1 Ind. 471, and *Chandler, Adm'r v. Schoonover*, 14 Ind. 324, if the evidence sustains the finding of the Court.

The rule is, that where the evidence tends to sustain such finding, or the verdict of a jury, the appellate Court will not reverse the judgment of the Court below for alleged error in refusing a new trial. In this case, the evidence is clearly in favor of the finding below. The question of damages will come up before the lower Court, on the dissolution, by that Court, of the injunction it granted herein.

The judgment is affirmed, with costs.

THE TOLEDO AND WABASH RAILWAY CO. v. DANIELS.

PLEADING.—In a complaint to recover the value of stock killed by a railroad company, in one count whereof the stock is described as common stock, and in another as stock of the full blood, such difference is sufficiently material to sustain and render proper separate counts.

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RAILROADS.—Where a railroad is kept securely fenced by the company, and the fence is destroyed by unavoidable accident, as by fire, and is repaired by the company within a reasonable time after its destruction, but before it is so repaired stock gets upon the track and is injured, the company will not be held liable therefor.

PRACTICE—INSTRUCTIONS TO JURY.—It is error for the Court to charge the jury verbally, when requested by either party to reduce its instructions to writing.

APPEAL from the *Miami* Common Pleas.

DAVISON, J.—*Daniels* sued the railway company to recover the value of five head of cattle, viz: four heifers and one cow, alleged to have been killed by the defendant's locomotive and cars, while running on her railway, at a point where it was not fenced. The complaint consists of two counts, each is founded on the statute, and is in the usual form. The only difference between them is, that in the first the cattle are described as of the full blood, but in the second as common stock. At the proper time the defendant moved that the plaintiff be ruled to elect on which count he would go to trial, and in default of such election, that the second count be stricken out, the two being, in effect, identical. This motion was overruled; thereupon the defendant demurred to the complaint, but her demurrer was overruled. These rulings are not erroneous. We have looked into the complaint and find it, in point of form and substance, unobjectionable. And the difference between the counts, to which we have referred, is, it seems to us, sufficiently essential.

Defendant answered: 1. By a denial. 2. That the road at the place where, &c., had been securely fenced; that a fire originating by accident had communicated to the fence and destroyed a part of it; that the defendant within a reasonable time, viz: twenty-four hours, after notice of its destruction, repaired and securely fenced the road at the place where,

The Toledo and Wabash R. R. Co. v. Daniels.

&c., and that the injury complained of happened in the interim between the time the fence was destroyed as aforesaid and before the defendant had notice of the defect in the fencing, or had time to repair or rebuild the same, &c. 3. The same as the second, with the additional averment that the fence, before the fire, was in good repair, and that it was repaired as speedily after notice as was possible. 4. That the road had been securely fenced; that the fence had been suddenly destroyed by fire; that before the defendant had notice and time to repair, the plaintiffs cattle came upon the road where the fence had been burned and were injured, and that the carelessness of the plaintiff in suffering his cattle to go at large contributed to the result. Demurrers to the second, third and fourth paragraphs of the answer sustained, and the defendant excepted.

The statute upon which this action is based contains the following provisions:

"SEC. 3. On the hearing of the cause the court or jury hearing the same shall give judgment for the value of the animal or animals destroyed or injury inflicted, without regard to the question, whether such injury or destruction was the result of willful misconduct or negligence, or the result of unavoidable accident."

"SEC. 4. This act shall not apply to any railroad securely fenced in, and such fence properly maintained by such railroad company." Acts 1853, p. 113; Acts 1859, p. 106.

Under these provisions it is insisted that the defendant is liable, though the fence had been destroyed by "unavoidable accident," and was repaired within a reasonable time after its destruction. This position seems to be incorrect. The statute, as we construe it, does not refer to such "unavoidable accident" as may cause the destruction of the fence, but to such as occur on the road when it is not securely fenced, or when it is fenced and such fence not properly maintained.

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The demurrers concede that the road at the place where, &c., was, until destroyed by a fire, which originated by accident, securely fenced. And it seems to us that the fence, having been thus destroyed, should be deemed properly maintained, if the defendant repaired it within a reasonable time after it thus became insecure; *Munch v. The Central R. R. Co.*, 29 Barb. 647; still, however, the paragraphs are demurrable, because they do not allege that the defendant repaired the fence within a reasonable time after it was destroyed. But whether these paragraphs were or not valid defences to the action can not be regarded an important inquiry in the case, because the defendant on the trial was allowed, without objection, to introduce testimony conducing to prove all the facts affirmatively alleged in the answer. The issues made by the general denial were submitted to a jury who, in answer to questions propounded to them at the instance of the parties, found specially, and also found a general verdict for the plaintiff. Motion for a new trial denied and judgment.

The evidence is upon the record, and we have examined it carefully. It is to some extent conflicting, though its weight, it seems to us, does not sustain the findings of the jury. There was, however, some evidence which tended to support the verdict, and we would not, therefore, be inclined to reverse on the ground that it was insufficient. But there is a bill of exceptions in which it is alleged that the defendant, "before the evidence was commenced, asked and required of the Court, verbally and in writing, that the charge to the jury, and every modification thereof, should be in writing," and that notwithstanding the requirement thus made, the Court proceeded to charge the jury verbally, in the words following: "This is an action brought against the defendant to recover the value of the property alleged by the plaintiff to have been killed on said road. It has been intimated by the defendant's counsel that you may disregard the instructions of

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the Court as to the law governing the case, but we say to you that you can not do that. The Court may err, but it is not the province of the jury to determine whether the law as delivered to them by the Court be correct or incorrect. If wrong, the party feeling agrieved by it, has his remedy by appeal to the Supreme Court." To the giving of this charge the defendant at the time excepted, on the ground that it was not in writing.

The code says: "When the argument of the cause is concluded, the Court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party." 2 R. S. (G. & H.) page 198, sec. 324. This provision seems to be imperative. Indeed we have often decided that when the Court has had timely notice of the desire of one of the parties that a written charge only shall be given to the jury, it is error to give a verbal charge, or if written to accompany it with verbal modifications or explanations. *Laselle v. Wells*, 17 Ind. 83; *Kenworthy v. Williams*, 5 Ind. 375; *Rising Sun Turnpike Co. v. Conway*, 7 *id.* 187. But the appellees argue that the spirit of the law has been complied with; that its purpose was to give the party, requiring instructions to be in writing, the benefit of a record containing the words used by the Court; that, in this instance, the judge, at the very time the objection was made, set out, in a bill of exceptions, the exact words used by him in his verbal charge, and hence the plaintiff has no right to complain. We are not inclined to adopt that argument. The statute, as we understand it, requires the Court, when asked for written instructions, to reduce them to writing, and then give them, as written, to the jury. This construction of the statute, in its strictness, as a rule of practice, imposes no hardship, and were the rule once relaxed it is easy to see that the object of it would be defeated. *The Turnpike Co. v. Conway*, *supra*.

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We think that the Court, in charging verbally when requested to charge in writing, committed an error for which there should be a reversal.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

William Z. Stuart, for the appellant.

THE CITY OF MADISON *et al.* v. WHITNEY, President, &c.

BANK STOCK—TAXATION.—Under the charter of the city of *Madison*, bank stocks should be assessed, for municipal taxation, in the names of the individual stockholders, and not in the name of the bank.

SAME—STATUTES CONSTRUED.—The act of 1861, providing for the taxation of bank stocks against the banks, and not the stockholders, only applies to the taxation for State and county purposes, and not to taxation for municipal purposes. 1 G. & H. 17.

SAME.—*Semble*, that municipal corporations can not tax bank stock owned by non-residents of the city, because such stock can have no location or *situs* other than the domicile of the owner.

SAME—UNITED STATES STOCKS.—*Semble*, also, that the bonds and stocks of the *United States* can not be taxed under State authority.

SAME.—But, *quære*, whether a bank, organized under the general banking law of *Indiana*, can legally divert her capital from the business for which the corporation was created, and invest it in *United States* stocks, and thus deprive the State of any revenue therefrom.

APPEAL from the *Jefferson* Circuit Court.

WORDEN, J.—The *Indiana Bank* is a stock bank, organized under the general banking law of *Indiana*, doing business

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and having its banking house in the city of *Madison*. The paid-in capital of the bank, at the time of the assessment of the taxes hereinafter mentioned, was 103,500 dollars. A part of the stock, viz: 90,000 dollars thereof, had been invested in the bonds of the *United States*, issued and purchased by the bank after the passage of the act of Congress of *February* 25, 1862. "The said bank having loaned that much of her capital to the *United States* and taken said bonds therefor."

The city of *Madison* for the year 1862 assessed a tax against the bank on her capital stock for municipal purposes. This action was brought to restrain the collection of said taxes, and a perpetual injunction was granted below. The city appeals. There were two grounds on which it is claimed that the taxes were not collectable: *First*, that the stock should have been assessed to the individual stockholders and not against the bank; and, *Second*, that the amount thus invested in the bonds of the *United States* was not taxable. We are of opinion that the first position was well taken.

The city of *Madison* is governed by a special charter. Under that charter the proper mode of taxing bank stock is to assess it against the individual stockholder, and not against the corporation. *King v. The City of Madison*, 17 Ind. 48.

An act was passed in 1861 (1 G. & H. p. 17,) providing for the taxation of bank stock against the banks, and not the stockholders, but this act, as we construe it, only applies to taxation for State and county purposes, and not to taxes to be collected by municipal corporations. Whether or not cities, existing under the general law for the incorporation of cities, might not assess and collect taxes against the stock banks in the manner prescribed by the act of 1861, we have not inquired; but we think it clear that the city of *Madison* can only assess the tax upon the stockholders.

It appears in the case that a portion of the stock was owned by persons who were not inhabitants of the city, and it is

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proper to remark that it would seem, from the general tenor of the decisions, that such stock can not be taxed by the city; such stock having no location or *situs* other than the domicile of the owner. *Hoyt v. The Commissioners of Taxes*, 23 N. Y. 224; *The City of Evansville v. Hall*, 14 Ind. 27; *Powell v. The City of Madison*, at the present term. The judgment below will have to be affirmed, on the ground that the taxes could not be assessed against the bank, whatever might be our views on the second ground on which it was sought to restrain the collection. We shall express no opinion on the latter question, as the result must be the same whatever might be our conclusion in respect to it. But for convenience of reference, we note the following authorities as bearing upon the question of the taxation, by or under State authority, of the stocks of the *United States*: *The People ex rel. The Bank of the Commonwealth v. The Commissioners of Assessments, &c.*, 32 Barb. 509; reported in *Bankers Magazine* for *December*, 1860. In this case it was held that such stocks were taxable by State authority. This judgment was affirmed by the Court of Appeals. 23 N. Y. 192. But was reversed by the Supreme Court of the *United States*. *Am. Law Reg.* vol. 11, p. 614. See also *id.* p. 81, for a case originating since the act of Congress exempting such stocks from State taxation. The above cases we believe contain a reference to all the previous adjudications that bear upon the question. Admitting that the stocks and bonds of the *United States* can not be taxed by State authority, still it might be a question worthy of examination whether a bank, organized under our general banking law, could divert her capital from the business for which the corporation was created, and invest it in *United States* stocks, thereby depriving the State of a revenue which she might have contemplated receiving when the law was passed, by virtue of which the bank was brought into existence. But of this we determine nothing.

Reagan v. Long's Administratrix.

Per Curiam.—The judgment below is affirmed, with costs.
R. J. Bright and *H. W. Harrington*, for the appellants.
C. E. Walker, for the appellee.

REAGAN v. LONG's Administratrix.

ADMINISTRATOR *de son tort*.—A person sued as an administrator *de son tort*, to recover the value of assets of the estate, which he had converted to his own use, or disposed of, is entitled to be allowed, in reduction of damages, the amount of such assets applied by him to the proper uses of the estate, in the payment of debts, or otherwise.

SAME—PRACTICE.—In such an action, the defendant, under the general denial of the complaint, may give evidence generally tending to disprove the plaintiff's right to recover, or to damages.

APPEAL from the *Hendricks* Common Pleas.

PERKINS, J.—*Terrissa Long*, administratrix of the estate of *Henry Long*, deceased, sued *William I. Reagan* in an action in the nature of trespass, to recover of him the damages *Long's* estate had sustained through his intermeddling with the property of the deceased. *Reagan* answered in general denial, and by setting up several matters of defence specially, some going in bar, and some in mitigation of damages. His special answers were held bad on demurrer. On the trial upon the general issue, the plaintiff had judgment.

The facts are shortly these: After the death of *Long*, his widow, *Terrissa*, before taking out letters of administration, disposed of certain property of the deceased to *Reagan*, and also placed in his hands accounts which he was to collect, and, with the proceeds, pay debts owed by the deceased.

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Reagan collected the accounts, amounting to 81 dollars, and applied the amounts in payment of *Long's* debts. Afterwards, *Terrissa Long* took out letters of administration, and then sued *Reagan*, in her representative capacity, for tortiously interfering with the property of the deceased; sued him, in short, as an administrator *de son tort*, and recovered the value of the property she had disposed of to him, and the amount of money he had collected on the accounts she had placed in his hands, and perhaps something more, allowing him no credit for the amount of it, which he had applied to debts of the estate, &c.

The judgment below was wrong. *Reagan*, at all events, conceding him to have been an executor *de son tort*, should have been allowed, in reduction of damages, the amount he proved, under the general denial, he had not converted to his own use, but to the use of the plaintiff in her fiduciary character, being that in which she sued.

It may be observed, that an administrator can allow claims against an estate, but those interested, may, at some time, contest the justice or correctness of the allowance, in the Common Pleas Court, in which this suit was tried.

The defendant put in an answer in mitigation of damages, but it was held bad on demurrer, because it purported to go in bar of the whole cause of action. But we think the question of damages arose upon the general denial. The plaintiff, in actions like the present, where the damages are indefinite, has two points to prove, viz: a cause of action to a nominal amount at least, and the amount of damages beyond that sum. These questions arise on the general denial. Hence, as the plaintiff must prove these points on the general denial, the defendant may give evidence tending to disprove them.

In this case, if the defendant had not converted the goods to his own use, but to the use of the plaintiff, she had not

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been damaged in the amount of their value by such conversion.

Matter in mitigation, in this State, under the code, is required to be specially pleaded only in actions of slander.

There was nothing shown in this case touching preferred claims. And in such case, all the common law authorities lay down the rule as above stated. Went. on Ex. p. 324, note 1; Will. on Ex. 154; Toll. on Ex. 365; 2 Black. Comm. 508. See, particularly, *Bennett v. Ines*, 30 Conn. Rep. 229, and see the same volume at page 108. We don't think our statute changes the common law in this particular. 2 G. & H. p. 488.

The judgment must be reversed for the error already pointed out. Two other questions might well be examined, in the further progress of the cause.

1. Was not the widow the executrix *de son tort*, and not the person to whom she, as such, disposed of the goods of the deceased? or were both parties such?

2. Did not the subsequently taking out of letters by the widow make good her acts from the decease of her husband; in other words, did not the letters, when taken out, relate back to her first act as executrix *de son tort*?

These questions are worthy of examination; but as they have not been alluded to by counsel, we intimate no opinion upon them. See the authorities, *supra*.

So the question of demand, which has been suggested by counsel, is worthy of fuller examination than it has received.

Generally, a person holding property of another, must be in the condition of a wrong doer before he is liable to suit for such property. Hence, an agent, or bailee, is generally not suable till after demand. But if an agent deny his agency *Ohit. Cont.* 7 Am. ed. 231, note; or if a factor, to whom goods have been consigned for sale, unreasonably neglect to render an account of sale, an action may be maintained

• Howard et al. v. Babcock.

against him for the proceeds without a previous demand, such acts constituting the person a wrong doer. 7 Pick. 214; *Id.* 146; 4 Rawle 223; 24 Wend. 203; Chit. Cont. *supra*, 619, note. See 20 U. S. Dig. Tit. Demand.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

C. C. Nave, for the appellant.

P. S. Kennedy, for the appellee.

HOWARD *et al.* v. BABCOCK.

RULE 30.—Unless a bill of exceptions contain the words, “this was all the evidence given in the cause,” it will not exclude the presumption of other evidence.

APPEAL from the *Vanderburgh* Common Pleas.

Per Curiam.—There is no question made in this case, except as to the sufficiency of the evidence to sustain the finding. The record does not contain all the evidence, as the bill of exceptions does not comply with the 30th rule, by stating that “this was all the evidence given in the cause.”

The judgment below is affirmed, with costs.

James E. Blythe, for the appellants.

Morris S. Johnson, for the appellee.

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HALL v. THE STATE.

CRIMINAL LAW AND PRACTICE.—The record on appeal, in a criminal case, tried on indictment, must show that the grand jury was regularly empannelled, and the indictment duly returned by them in open Court.

APPEAL from the *Madison* Circuit Court.

Per Curiam.—Indictment of the appellant for larceny. Motion to quash overruled. Trial, conviction, and sentence of imprisonment in the State's prison, a motion in arrest being overruled. The record does not show any empannelling of a grand jury, or the return by that body of the indictment into Court. A *certiorari* has been issued in this behalf, but the return thereto fails to supply the imperfections of the record.

The judgment below is reversed.

James W. Sansberry and *Voss & Kane*, for the appellant.

Oscar B. Hord, Attorney General, for the State.

McCrary v. THE STATE ex rel., &c.

APPEAL from the *Morgan* Circuit Court.

Per Curiam.—Suit upon a forfeited recognizance. Judgment for the plaintiff. Appeal to this Court.

The record, as first filed, and on which errors were assigned, was defective, and the errors upon that record were well taken.

But a *certiorari* has been issued and returned, accompanied by a complete record. That record shows that the errors, as-

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signed upon the first, do not, in fact, exist; and no further errors have been assigned upon the complete record.

The judgment below is, therefore, affirmed, with costs, and 1 per cent. damages.

R. L. & T. D. Walpole, for the appellant.

Oscar B. Hord, Attorney General, for the appellee.

LOWRY v. COOPER.

CONTRACT.—Where a contract is made for the delivery of a certain number of a particular lot of hogs, it can not be discharged by the delivery of the like number of any other hogs, although of equal quality and weight, unless performance, in this respect, is waived by the parties.

APPEAL from the *Montgomery* Common Pleas.

HANNA, J.—*Lowry* contracted as follows: "This agreement witnesseth, that *Oliver C. Cosby* and *Jasper Truett* have sold to *John Lowry* fifty head of fat hogs, to be weighed on *Jacob Shole's* scales, and to weigh 200 pounds and upwards each gross, and to be delivered to the said *Lowry*, at said scales, between the 25th of *November* and 25th of *December*, 1857, for which said *Lowry* agrees to pay, &c. *September 9*, 1857." Signed by the parties.

Cooper avers, that, before the 25th of *November*, he purchased the interest of said *Cosby* and *Truett* in said contract, with consent of *Lowry*, who agreed to said substitution, and that he would perform, &c. It is further averred that the plaintiff performed said contract, and said defendant failed, in this, that he failed and refused to receive and pay for said hogs, &c. Answer, denial and failure upon the part of said *Lowry*, &c. Trial, finding and judgment for the plaintiff.

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But one point is made, and that is, that the finding and judgment are not sustained by the evidence, in this, that it is shown, that a part of the hogs weighed by *Cooper*, and held ready for delivery, were not obtained by him from *Cosby* and *Truett*, nor owned by them at the time said contract was entered into. *Alexander v. Dunn*, 5 Ind. 122. In other words, that the contract contemplated that *Cosby* and *Truett* then owned and possessed 50 hogs that were to be delivered in discharge of its terms. Such appears to be the purport of the case in 5 Ind., above cited. The writer of this opinion entertains serious doubts in regard to the correctness of the opinion pronounced in that case; but it is not necessary for the Court to review the question, there decided, in this case, because here, the evidence, we think, shows the construction which the parties themselves placed upon said writing. It is shown that the plaintiff went to the house of the defendant, and "asked him if he was willing that *Cosby* and *Truett* should assign their contract to him; defendant said he was perfectly willing to the transfer; that he did not care who filled the contract."

It further appears that the defendant was at the house of *Cooper*, and fixed the day—a week then hence—that the hogs were to be delivered, which was complied with by *Cooper*, as to time, number and weight. *Lowry* did not appear to receive them, nor did he offer objections in any form.

It appears to us, whatever legal construction might have been placed upon the language employed in the writing, aside from these surrounding circumstances, that, when viewed in the light of those circumstances, it is evident that it was not expected, by the parties to the transaction, that, by the terms thereof, only certain hogs were to be included therein.

The statement of *Lowry*, that he did not "care who filled the contract," is scarcely reconcilable with the position now assumed, that he had contracted for the hogs of *Cosby* and

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Truett. If such was the contract, the delivery of the specific article only would have filled the contract, and could have been accomplished alone by *Cosby* and *Truett* themselves, or through another. The contract could not, therefore, have been by them "transferred," without also transferring the hogs. Evidently this was not in contemplation by the parties in their conversations.

Per Curiam.—The judgment is affirmed, with costs, and 5 per cent. damages.

McDonald, Roache & Willson, for the appellant.

Lewis Wallace and *M. D. White*, for the appellee.

SWAILS v. COVERDILL.

TERMS OF COURTS.—Where the term of a Circuit Court begins on the 20th day of *October*, and may continue two weeks, if the business requires it, but in fact continues only one week, and the term of the Common Pleas Court, for the same county, begins on the 27th day of *October*, and is in fact begun on that day, it can not be objected to the validity of the latter term that it was holden during the term of the Circuit Court.

PRACTICE IN SUPREME COURT.—Where an affidavit for a continuance is filed, but the record on appeal fails to show that any motion, based thereon, was made, or that the Court took any action in reference thereto, the alleged error in refusing a continuance will not be considered in this Court.

SAME.—Where error is alleged to have been committed in the admission of testimony, it will not be available in this Court, unless the ground of objection was stated to the Court below.

APPEAL from the *Decatur* Common Pleas.

Swails v. Coverdill.

Per Curiam.—Action by *Coverdill* against *Swails*, to recover for services as attorney at law, in attending to a case upon indictment, in the *Decatur* Circuit Court, for an assault and battery, with intent to murder. Upon the issues, there was a verdict for the plaintiff. Motion for a new trial denied, and judgment, &c.

The errors are thus assigned:

1. The term of the Court, at which the cause was tried, was not held at the time prescribed by law.
2. The Court erred in its refusal to continue the case.
3. Illegal testimony was allowed to be given over the defendant's objection.
4. The verdict is unsustainable by the evidence.

The Circuit Court, for *Decatur* county, as required by law, begun its fall term on *Monday, October* the 20th, 1862, and was allowed to continue in session two weeks, if business thereof required it; 1 G. & H. p. 282; but that Court adjourned before the expiration of the space of time so allowed, viz: on *Monday*, the 27th of *October*, and on that day the term of the Common Pleas, at which this case was tried and determined, was commenced in the usual form, and adjourned until *Thursday*, the 30th of *October*.

Upon these facts, it is argued, that the Common Pleas, having commenced and held its *October* term within the period of time allowed by law for the holding of the Circuit Court, was illegally holden. We think otherwise. The Common Pleas was begun on the day fixed for its commencement by the statute. 1 R. S. G. & H. p. 279, sec. 11. It is true, an act, approved *March* the 1st, 1859, authorized the Common Pleas, when the Circuit Court was in session at the time the former should have been held, to hold its term on *Monday* succeeding the time of the Circuit Court; but that act was repealed by a statute passed *March* the 5th, 1859; *Church v. Stadler*, 16 Ind. 463; which repealing statute is still

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in force. 1 G. & H. p. 281, sec. 28. There seems to be no reason why the term of the Common Pleas, commenced *October* the 27th, 1862, should not be deemed regular and legal.

An affidavit, to delay the trial for a day, on account of the absence of the defendant, is set forth in the transcript; but no motion, founded on the affidavit, appears to have been made; nor does it appear that any action of the Court was had in respect to the affidavit. Hence, there is nothing in the second assigned error. And the third is equally unavailing, because, though certain testimony was admitted over the defendant's objection, the ground of objection was not stated to the Court. Nor can we, under the fourth assignment, adjudge whether the evidence is or not sufficient to sustain the verdict, because the record contains no sufficient averment, as required by rule 30 of this Court, "that this was all the evidence given in the cause."

The judgment is affirmed, with costs, and 5 per cent. damages.

Samuel Bryan, for the appellant.

Hord & Ewing, for the appellee.

THE STATE *ex rel.* KEEN *v.* WILSON.

BASTARDY—ACTION.—An agreement and admission by the mother of a bastard child, that provision for the maintenance of the child has been made to her satisfaction, will not bar an action by her, for such maintenance, against the father of the child, unless such agreement and admission are entered of record with the consent of the mother, and the mere fact that she filed her agreement and admission in Court, is not sufficient to bar her right of action.

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RULE 30.—To exclude the presumption of other evidence, a bill of exceptions should contain the words, "this was all the evidence given in the cause."

APPEAL from the *Delaware* Circuit Court.

DAVISON, J.—Prosecution for bastardy. The defendant, the present appellee, answered the complaint. His answer consists of two paragraphs. To the first a demurrer was overruled, and the plaintiff excepted; but to the second it was sustained. The first paragraph alleges, that, after the commencement of the prosecution, viz: on *March* the 31st, 1859, the defendant made provision for the maintenance of the bastard child to the satisfaction of *Mariah Keen*, the mother and relatrix; whereupon she made and filed in said Court her written admission of such provision, which is in this form:

"Know all men, &c., that I, *Mariah Keen*, of, &c., in consideration of 50 dollars to me paid as follows: 10 dollars in hand, 20 dollars in three, and 20 in six months from date; said 40 dollars to be secured to me by notes, with approved security, the receipt whereof is hereby acknowledged—have released, and, by these presents, do forever release, to *George Wilson*, of, &c., all actions, and rights of actions, that I, at this time, have against him for bastardy, breach of marriage contract, or for any other cause whatever, either in law or equity, or otherwise, reserving the right of keeping the bastard child.

"In witness whereof, I have hereunto set my hand and seal, this 15th of *February*, 1859. **MARIAH KEEN, [SEAL].**"

Whereupon the defendant prays judgment that this cause be dismissed, &c.

The plaintiff replied to this defence by five paragraphs. The defendant demurred to the fourth. The Court sustained

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the demurrer, and an exception was taken. In that paragraph, it is alleged, that, at the time of the execution of the written instrument, set out in the answer, the said *Mariah* was an infant, under the age of 21 years, and incapable, in law, of making such instrument, or of making a valid contract, and she now disaffirms said instrument, and surrenders to the defendant all she has ever received from him, and tenders the same to him, &c. The issues of fact were submitted to the Court, who found for the defendant, and, having refused a new trial, rendered judgment, &c.

Are the rulings upon the demurrers correct? Section 17, of the act regulating prosecutions in cases of bastardy, says: "The prosecuting witness may, at any time before final judgment, dismiss such suit, if she shall enter of record an admission, that provision for the maintenance of the child has been made to her satisfaction, such entry shall be a bar to all other prosecutions for the same cause and purpose." 2 R. S. G. & H. p. 628. "As we understand this provision, the Court can not order the entry of admission to be made upon the record, unless at the instance of the prosecutrix herself, and until such entry is made, the suit can not be dismissed," but must progress to a final trial on the merits. The answer, then, is defective, because it fails to aver that the instrument, which it recites, was, by the consent of the relatrix, entered upon the record. It is not enough to allege, merely, that she filed her admission in Court. In *Piskler v. The State, ex rel.*, 4 Ind. 266, it was held, that "the statute requires the admission of the prosecutrix, 'that provision for the maintenance of the child has been made to her satisfaction,' to be confirmed and acted upon by her in open Court." Here there is no averment that she confirmed and acted upon the alleged admission; but if the facts, alleged in the reply, be true, and the demurrer concedes them to be so, she disaffirmed it. The answer does not, in our opinion, contain facts sufficient to

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constitute a defence to the action; and, that being the case, the demurrer to the reply should have not been overruled.

We have not looked into the evidence, for the reason that the record does not, as required by rule 30 of this Court, contain the averment, that "this was all the evidence given in the cause."

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

David Nation and Thomas S. Watterhouse, for the appellant.
C. E. Shipley, for the appellee.

WOOD v. THE STATE.

CRIMINAL LAW AND PRACTICE.—An information for retailing, without license, is not sufficient if it merely aver the sale of one pint of whisky, without averring that it was sold in a less quantity than one quart.

STATUTES CONSTRUED.—The temperance law of 1859 prescribes no penalty against the sale of intoxicating liquor, in quantities of one quart or more, on *Sunday*.

APPEAL from the *Dekalb* Common Pleas.

Per Curiam.—The information in this case is against *John Wood* for selling "one pint of whisky on *Sunday*." The information is not good, as a charge of selling less than a quart under the general license law; because, though the defendant is charged with selling one pint, still, if he sold a barrel, he sold a pint, because a pint is contained in a barrel. *Struckman v. The State*, at this term.

If the information should be held as charging the sale of more than a quart, then there is no penalty for making such

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sale on *Sunday*. *The State v. Thomasson*, 19 Ind. 99. The prosecution should have been under a different statute. *Sohn v. The State*, 18 Ind. 389.

The judgment is reversed. Cause remanded to be dismissed.

D. E. Palmer, for the appellant.

Oscar B. Hord, Attorney General, for the State.

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APPEAL from the *Dekalb* Common Pleas.

Per Curiam.—The judgment in this case is reversed, for the reasons assigned in the next preceding case.

D. E. Palmer, for the appellant.

Oscar B. Hord, Attorney General, for the State.

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CRIMINAL LAW AND PRACTICE.—In an information, the statement in the caption of the title of the Court to which the information is presented is sufficient, without naming the county.

SAME.—A public street in a town or city is a public highway, and it is sufficient in an information to describe it as a public street.

APPEAL from the *Bartholomew* Common Pleas.

DAVISON, J.—The information in this case is as follows: “*State of Indiana v. John D. Mathis and Samuel Hege*—In the *Bartholomew* Common Pleas: *Jeptha D. New*, prosecuting attor-

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ney, &c., informs the Court that the defendants, on or about the 1st of *September*, 1862, owned a saw mill on *Jackson* street, in the town of *Columbus*, *Bartholomew* county, *Indiana*, which obstructed and hindered, and ever since hath continued to obstruct and hinder, the free passage of a public street of known notoriety, to-wit: *Jackson* street aforesaid, in the town, county and State aforesaid, in front of said saw mill, by piling lumber from said mill on said street in front of said mill, to the great annoyance and injury of the citizens of the town, county and State aforesaid," &c.

The defendants moved to quash the information. The Court sustained the motion and the State excepted.

This information is said to be defective on two grounds: 1. Its caption does not state the county in which the prosecution was instituted. 2. It charges the obstruction of a public street instead of a public highway. The first ground is untenable. See *Malone v. The State*, 14 Ind. 220. A statement of the title of the Court to which the information is presented is sufficient, without naming the county. 2 G. & H. pp. 400, 403, 404; and, moreover, the offence is charged to have been committed in *Bartholomew* county. But *Malone v. The State*, *supra*, is decisive, that the first ground of objection is not well taken. Nor is the second at all available. "A public street in a town is a public highway." *Conner v. New Albany*, 1 Blackf. 43, 45; *Common Council, &c. v. Croas*, 7 Ind. 9, 12. It may be that the town of *Columbus* is incorporated and has assumed by her by-laws to punish offences of this character; but whether this be so, does not appear in the record, and hence we must intend that the Common Pleas had full cognizance of the case made by the information.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Oscar B. Hord, Attorney General, and *John Mullany* and *Francis T. Hord*, for the appellant.

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HITCHCOCK *et al.* v. THE STATE.

CRIMINAL LAW AND PRACTICE.—In a criminal prosecution on appeal, where the clerk returns to a *certiorari* that the papers are lost and copies of the indictment or information can not be given, the judgment below will be reversed by this Court.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—Prosecution for burglary. The record shows no indictment or information against the defendants. In a return to a *certiorari*, the Clerk says the papers are lost, and copies, therefore, can not be given.

The judgment will, of course, have to be reversed, and the defendants will be remanded back to the jail of *Tippecanoe* county for final disposition by the proper Court of that county.

It is not improper that we should here remark, that, through the carelessness of the county clerks in making proper entries of the filing of indictments and informations, and in the keeping of them on file after they are filed, the efficiency of the administration of the criminal law is greatly impaired. How are so many indictments and informations lost? Some measures should be adopted to correct this grievous abuse, or the criminal code may as well be abrogated.

Per Curiam.—The judgment below is reversed, and the clerk directed to certify to the keeper of the penitentiary to return the prisoners to the *Lafayette* jail in *Tippecanoe* county.

McDonald & Roache, for the appellant.

Oscar B. Hord, Attorney General, for the State.

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APPEAL from the *Greene* Circuit Court.

Per Curiam.—The transcript originally filed in this case showed that the term of the Court at which the indictment was returned and the defendant arraigned, was held by *David Sheeks, Esq.*, and not by Judge *Claypool*, the judge of said Court, and did not disclose the authority by which said *Sheeks* assumed to act in that capacity, or by what means he become for the time being the judge of said Court. Afterwards, in answer to a *certiorari*, the clerk furnished a transcript embodying an appointment of said *Sheeks* by the officers of the county, under the statute.

But one error is assigned and that is based upon said omission in the record, which is now supplied.

The judgment is affirmed, with costs.

McDonald & Roache, for the appellant.

Oscar B. Hord, Attorney General, for the State.

SCHOPPENHAST v. BOLLMAN and Wife.

ATTACHMENT—GARNISHMENT—PRACTICE.—Action by *A* and his wife on three promissory notes made payable to the latter by *B*. Answer by *B*, first to the whole complaint, that *A* is the owner and real party in interest in said notes, stating sufficient facts, and that, in a certain attachment proceeding against *A*, he had been compelled as garnishee to pay a large part of said notes, &c.; second, as to the third note, averring the same facts; third, as to the other two notes, averring the same facts. Demurrers sustained to the first and third, and overruled to the second, paragraphs. In the attachment proceedings relied upon in said paragraphs, the wife *A*

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was not a party. *B*, in his answer in said proceedings as garnishee, stated that he executed the notes payable to the wife of *A* for the assignment to him by her and *A* of a certain title bond held in her name, but did not state that *A* was the owner and real party in interest in said notes. In said attachment proceeding, there was a sufficient complaint originally filed on two notes, and an affidavit in attachment, sworn to by the plaintiff therein, stating that he had a just demand against the defendant therein on said two notes, which were due, and that the defendant was about to leave the State, with intent to defraud, &c. Afterwards, and before the trial, another note between the same parties fell due, and, by amendment, was included in said complaint, but no additional affidavit was filed, and then judgment in attachment was rendered for the amount of all the notes. The defendant in the attachment was only constructively notified of its pendency. It is insisted that said attachment proceeding is wholly void as to the wife of *A*, because she was not a party thereto, and that it is wholly void as to them both, because of the error in taking judgment for the amount of three notes without an additional affidavit, and that *B* can not avail himself, as a defence herein, of the payments made by him as such garnishee.

- Held*, 1. That the demurrer by *A* and wife to the first paragraph of *B*'s answer herein admits the ownership by *A* of the notes herein sued on as alleged in said paragraph.
2. That, although said proceedings in attachment were irregular, and the judgment erroneous, yet under the circumstances they are not absolutely void, but were such as the garnishee might regard in making payment, and that payment so made would discharge him from further liability to *A* or his wife.
3. That, where the defendant in attachment, in the main action, is personally served with process, the attachment is not the foundation of the jurisdiction, and in such case, if the attachment illegally issues, it is the privilege of the defendant alone to take advantage of it.
4. That, where the proceeding is *ex parte*, without personal service upon or appearance by the defendant, the jurisdiction is acquired over him only by an attachment of his property, and, if the

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latter illegally issues, the proceedings under it will be void, and in the latter case, the garnishee is therefore interested to know that the jurisdiction has duly attached, but has no right further to interfere in the proceeding, and he is not responsible for the regularity of the proceeding in the main action.

APPEAL from the *Marion* Circuit Court.

HANNA, J.—Suit by the appellees on three promissory notes payable to said female appellee. Answer in three paragraphs. The first is to the whole complaint, and sets up facts to show that said *Bollman* is the real owner and the party in interest in said notes, so payable to his wife; and that said appellant, as a garnishee in certain attachment proceedings instituted against said *Bollman*, had been compelled to pay, &c., a great part of said notes, and for the balance a recovery had been obtained, &c.

The second paragraph is pleaded as a defence to the third note, and avers the same facts and the same recovery, &c. The third is pleaded as a defence to the other two notes and sets up the same payment as garnishee, &c.

Copies of the proceedings and judgments in said suits, &c., are set forth.

Demurrers were sustained to the first and third paragraphs, and overruled as to the second. Judgment upon the two notes first due for the plaintiffs, and, as to the other, for the defendant. Upon these rulings on demurrers, errors and cross-errors are assigned.

In the former suits and attachment proceedings said female plaintiff was not a party, and it is insisted that the record of those proceedings can in no measure conclude her.

We suppose the demurrer admits the truth of the allegations tending to show the real ownership of, or interest in, said notes. A question then arises as to whether they were subject, under the attachment proceedings, to *Bollman's* debts; and if so, whether, in such proceedings, averments

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setting forth the facts should have been made? Our statute regulating attachments authorizes the proceeding by garnishment against any person that is indebted to the defendant; sec. 175, p. 67, 2 R. S.; and from the day of the service of the summons in said proceeding, the garnishee shall be accountable to the plaintiff, &c. *Id.* 68.

The record of such proceeding shows that the garnishee, the present defendant, in his answer stated the facts that he gave notes payable to *Mrs. Bollman* for the assignment of a title bond, held in her name, by her and her husband, (but does not set out the circumstances as in the answer in this case,) and that he was not indebted to said *Herman Bollman*, unless these facts created an indebtedness. No further pleadings appear.

It is urged that the judgment in those proceedings was void as to *Mrs. Bollman*, because she was not a party, and because no evidence could have been received, under said pleadings, that would have authorized said judgment; and that those proceedings were void as to both *Bollman* and wife, for the reason that the proper affidavit and notice do not appear. The affidavit related to the two first notes due, and was against *Bollman* and wife. Before the trial the third fell due, and, by an amendment, was included in the complaint, and judgment given for all three of said notes against *Bollman* alone. If not void, it is urged the said proceedings were erroneous, and can not be enforced against one who was not a party and had no opportunity to proceed for the correction of said errors.

On the other hand it is insisted that, whatever irregularities and errors might have occurred, the garnishee was not in a situation to have them corrected, and was justifiable in paying off the amount found against him in the proceedings, under such circumstances. It is thus conceded that irregularities and errors do appear in the record, and the payment

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having been made on such record, can the defendant avail himself of it to defeat this action.

It appears to us that, as the demurrer admitted such matters as were well pleaded in the answer, sufficient facts are therein averred to show that said *Bollman* was the real party in interest in said notes; that his wife had not such interest therein as would enable her to join as a plaintiff. If this is a correct view, and we think it is, the case is stripped of much of the difficulty that would otherwise, apparently, surround it. Then the main question to be determined is, whether the record makes a case in which the maker of the notes can shield himself behind the judgment, (and payment thereof,) against him in the proceedings in garnishment.

That the said *Bollman* is the real party in interest we think is manifest from the facts pleaded and thus admitted. It is charged that he originally purchased and paid his money on the real estate named in part payment therefor and executed his notes for the residue; that the title bond was made to his wife to defraud his creditors, he being at the time indebted to divers persons; that he sold said real estate and she assigned said bond to the appellant and took the notes in her name with a like fraudulent intention; that she paid nothing and was not bound to pay, and had no property, &c.; of which appellant was ignorant at the time of his purchase. It is urged that the proceedings in attachment were void, or if not void, irregular and erroneous, and that no defence to the suit on the notes can be based upon payments made in pursuance of judgments rendered therein.

On the other hand, as before stated, it appears to be conceded that said proceedings were irregular, but not invalid, and that the defendant in said garnishment was bound thereby.

The grounds for assuming that the proceedings were void are that the affidavit and notice were not in accordance with

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the statute prescribing the mode of proceeding in attachments.

Before examining the record upon the points in controversy, we will state some propositions in relation thereto, which appear to be settled:

1. Where the defendant, in the main action, is personally served with process, the attachment is not the foundation of the jurisdiction, but is a conservatory measure allowed to the plaintiff for the purpose of securing his demand. Drake on Att., § 692.

2. Where the proceeding is *ex parte*, without any service upon or appearance by the defendant, jurisdiction is acquired over him through an attachment of his property. *Id.*

Upon the first proposition, if the attachment illegally issues, it is nevertheless the privilege of the defendant alone to take advantage of it.

In the second case, as the attachment is the basis of the jurisdiction, if it be issued without legal authority, the proceedings under it are void.

From these propositions it results that, where the defendant is personally before the Court the garnishee is not in a condition in which it is compulsory upon him to question the jurisdictional legality of the proceedings, or their regularity as to the defendant. But where the defendant is not personally before the Court, the garnishee is concerned, as to the main action, only in the question of jurisdiction. Where that has attached, his right to inquire into or interfere with such procedure is at an end; for all that he is interested in is, that the attachment proceedings against himself shall protect him in another suit. That they will do so though there be in them errors and irregularities, for which the defendant might obtain their reversal, there can be no doubt. 3 B. Mon. 502; 12 Ill. 358; 1 Iowa 86; 8 Blackf. 419.

He could not, therefore, reverse a judgment against him on

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account of mere irregularities in the main action. They effect only the defendant, and it is for him to take advantage of them or to inquire into the merits as between himself and the plaintiff. 9 Missouri, 421; 29 Alabama, 141; 1 Ind. 156; 14 Louisiana, 511.

It follows that a garnishee, to be entitled to the benefit of a payment made under a judgment against him as such, is not to be held responsible for the regularity of the proceedings in the suit in which he is garnished. 19 Alabama, 246; 8 Stewart, 326; 8 Blackf. 418.

One of the grounds for an attachment is, "that the defendant is secretly leaving the State with intent to defraud his creditors." 2 G. & H. 138. It is further provided that, "the plaintiff, or some person in his behalf, shall make an affidavit showing: 1st. The nature of the plaintiff's claim; 2d. That it is just; 3d. The amount which he believes the plaintiff ought to recover; 4th. That there exists in the action some one of the grounds for an attachment above enunciated." *Id.* 140.

The affidavit filed in the case under consideration was made by the plaintiff, and averred that he had a just and legal demand then due against the defendant, in two notes, for the sum of 325 dollars with the interest thereon; that defendant was about to leave, &c.

There was a complaint also filed on the two notes, giving copies of them. Afterwards, and before the trial, another note between the same parties fell due, and by an amendment was included in the complaint, and the judgment embraced the amount of all three of the notes. No additional affidavit was filed.

We are of opinion that, under the circumstances, the judgment in the attachment thus set out was not absolutely void, for this reason: The proceedings were irregular and said judgment perhaps erroneous, but such as the garnishee might regard in making payment, and such as he may rely upon in

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defence of this action upon said notes. But however this may be, there is another view which leads to the same result.

We are asked to say that the proceedings thus set forth are absolutely void, because this third note was thus included in the judgment.

This would be placing the whole defence upon the second paragraph of the answer; whereas the third paragraph was limited to this third note and shows that the same had been assigned by the present female plaintiff to a firm of which her husband was a member, and they assigned it to others, who sued the present appellant upon it, and he, in defence, set up the attachment proceedings now relied upon, as to all of said notes except a sum named, which had been tendered, and a reply in denial was filed; a trial had, and judgment for said sum so tendered. As to the third note, the judgment so rendered for said balance would, under the circumstances, whilst it remains in force, preclude another action upon the same note. However erroneous said judgment might be, yet in it the said note was emerged, on the facts shown.

As to the other two notes, the other paragraph of the answer sets up the attachment proceedings and payment as a garnishee, as a defence. We believe in that the defence was well made for the reasons heretofore given.

As to the question of notice of the pendency of the attachment proceedings, it is assumed in the brief of the appellee that three weeks publication, sixty days before, &c., was necessary, and that said time did not elapse before the institution of proceedings by one *Hausman*, and the term at which judgment was rendered, and that said proceedings were independent of the first proceedings in attachment, and not a claim filed thereunder.

There is no statute cited requiring sixty days publication, nor have we found any other than the general provision in reference to publication of notices; § 38, p. 63, 2 G. & H.;

The State v. Hays.

and that fixes the time at thirty days. We are also of opinion, from the whole record, that the proceedings by *Hausman* was for the purpose of becoming a party to the action, as provided in favor of any creditor. *Id.* p. 147. Such being the fact no notice, other than in that action was necessary.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

N. B. & C. Taylor, for the appellant.

J. Caven, for the appellees.

THE STATE v. HAYS.

MARRIED WOMEN—CRIMINAL LAW AND PRACTICE.—The wearing apparel of a married woman, furnished by her husband as a marital duty, remains his personal property during his life, and he can sell it or give it away during that period, but she may retain such as she may have at his death as her paraphernalia; and an indictment, for the stealing of such apparel, during the husband's life, charging it to be the property of the wife, can not be sustained.

APPEAL from the *Miami* Circuit Court.

PERKINS, J.—*Margaret Hays* was indicted for stealing certain articles of clothing, such as dresses, &c., charged to be the property of *Matilda Risinger*.

The Court instructed the jury, that, if they found that the goods stolen were articles of wearing apparel of *Matilda Risinger*, and that she was, at the time of the theft, the wife of *John Risinger*, and said goods were simply provided for her by her husband, under the legal obligation of husbands to support their wives, and were not specially presented to her as a gift, then the goods were not her separate property, but

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were the property of her husband, and the indictment could not be supported, &c.

The instruction was right. The wearing apparel of a married woman, furnished by her husband as a marital duty, remains his personal property during his life, and he can sell it or give it away during that period, but she has a right to retain it after his death, as her paraphernalia. Bouvier's Dic. h. t.; Wharton's do. h. t., and authorities cited.

Per Curiam.—The judgment is affirmed, with costs.

Oscar B. Hord, Attorney General, and T. C. Whiteside, for the appellant.

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PLEADING—PRACTICE.—The statute which requires, that “when any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading,” is imperative. 2 G. & H. 104, § 78. And, if a complaint is defective in this particular, it will be demurrable, and, if not demurred to, and a verdict is rendered thereon in favor of the plaintiff, yet judgment can not be rendered in his favor over a motion in arrest, and, if neither a demurrer nor a motion in arrest is interposed, still, the error will be available in this Court on appeal. 2 G. & H. 77, § 50; *id.* 81, § 54.

APPEAL from the *Hamilton* Common Pleas.

HANNA, J.—Suit against appellant and two others, charged as makers of a promissory note. Appellant answered in denial. Trial, finding and judgment for the plaintiffs, over a motion for a new trial and in arrest.

There is but one point made in the brief of appellant, and that is, that the judgment should have been arrested, because

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the complaint was insufficient, in this, that neither the note nor a copy thereof was filed therewith; nor was it averred that a presentation of said note had been made, it being payable in bank.

So far as the complaint discloses, there is nothing showing that said *Reveal* should have been charged in any capacity, other than as a maker. But we have a statute as follows: "When any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading." 2 G. & H. 104. It has been repeatedly held, that this statute is imperative, and that it can not be said that the complaint contains a sufficient cause of action, unless it is complied with. *Price v. The Grand Rapids, &c.*, 13 Ind. 58; *Kiser v. The State*, *id.* 80; *Hillis v. Wilson*, *id.* 146; 14 *id.* 106; 12 *id.* 352. Such a pleading is, therefore, subject to demurrer. We are now asked to determine whether it is good after verdict, in an instance where no demurrer has been filed.

Under the code of 1852, 2 G. & H. p. 80, sec. 50, subdivision 5, a complaint is subject to demurrer, for the reason that it "does not state facts sufficient to constitute a cause of action," and by section 54, "when any of the matters enumerated in section 50 do not appear upon the face of the complaint, the objection (except for misjoinder of causes,) may be taken by answer. If no such objection is taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the Court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action." This latter part was added by an amendment, in 1855. Under this, it has been often held, that the objection, last above named, may be made on appeal, although not raised in the Court below. *Bolster v. Catterlin*, 10 Ind. 117; *Bleckledge v. Benidick*, 12 *id.* 289.

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The code also (2 G. & H. p. 218, sec. 372,) provides, that, "when, upon the statements in the pleading, one party is entitled, by law, to judgment in his favor, judgment shall be so rendered by the Court, though a verdict has been found against such party." Under this, it has been held, that a motion, in the form of a motion in arrest of judgment, would lie in a proper case. *The Indianapolis, &c., Co. v. Davis*, 10 Ind. 398. That is, when there was no cause of action stated in the complaint.

Now, although it may be true, that a complaint may be sufficient to bar another suit on the same cause of action, and, for that and other apparently sufficient reasons, might formerly have been held good after verdict, yet, as the Legislature has seen proper to make it imperative, that in cases, similar to the one at bar, the note, or a copy, shall be filed with the complaint, we can do nothing more than carry out that expression of the legislative will, by holding that the statute shall be complied with, and, if not, that a judgment can not be rendered where a motion in arrest is interposed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

D. Moss, for the appellant.

McKERNAN v. MAYHEW et al.

CONTRACT—PAROL EVIDENCE.—*A* is embarrassed. *B*, his son, is willing to aid him in the adjustment of his indebtedness. He has some claims upon the Government for supplies furnished, but they are not yet finally adjusted and allowed. One of them was for 1,165 dollars. *B* therefore constituted *C* his agent, to aid in the

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settlement of his father's liabilities, and transfers to him said claims, and instructs him, that, if such of his father's creditors, as he shall designate, will surrender their claims in lieu thereof, and wait the payment of the Government claims, he will allow them principal and interest to date. What designation of creditors was made, does not appear. Many claims against *A* were filed with *C*, to be adjusted in the manner proposed by *B*. *E*, who filed the first three claims, received from *C* a receipt, in which they are fully described, and in which, after describing them, he adds, "to be paid out of the proceeds of an account of *F* and *G* for 1,165 dollars, for goods furnished the Government for the use of the *Oregon* volunteers in the *Jakina* Indian war, when collected by the undersigned, who holds a power of attorney for that purpose." Signed by *C*, in his individual name, and not as agent. The Government claims, left with *C*, were not sufficient to pay all the liabilities of *A*, to the extent proposed by *B*. *C* collected on the claim for 1,165 dollars, the sum of 776 dollars and 67 cents, in gold. *E* then assigned said receipt to *G*, who sued *C* upon the same, and demanded judgment for the said 776 dollars and 67 cents, and recovered.

- Held*, 1. That said receipt is assignable in equity, so as to enable the assignee to maintain an action upon it in his own name.
2. That it would be error, in the action upon said receipt, to allow *C* to aver or prove, that, notwithstanding his agreement stated in said receipt, the understanding between him and said assignor, at the date of said receipt, was, that said payment should be made *pro rata*, with all the claims filed against *A*, out of the aggregate amount, which should be collected on all said Government claims by *C*, as agent of *B*. Said receipt contains a contract which can not be altered by parol testimony, and creates a personal liability against *C*, for the amount collected on said claim for 1,165 dollars.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—The record makes the following case:

John Cain, Esq., of *Indianapolis*, was in debt. His son, *Andrew Jackson Cain* desired to relieve his father of his indebtedness; and, being possessed of some claims upon the

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Government, growing out of the Indian wars in *Oregon* and *Washington* Territories, he did, on the 30th of *March*, 1857, deposit with *James H. McKernan*, of *Indianapolis*, some amount of those claims, which appear to have been transferred to him by *Sellers* and *Friendly*, one of which claims was for 1,165 dollars, and, at the same time, gave *Mr. McKernan* a letter of instruction, as follows. After reciting his desire to aid his father, &c., he says:

“If such parties, [creditors of his father] as I shall designate, will surrender their claims, in lieu thereof, wait the payment of the war bond by the Government, and now in your possession, I will allow them principal and interest to date. If this arrangement does not suit the parties that I will designate, you will please enclose the bond to me, at *Madison, Indiana*,
Very respectfully, yours,
March 30, 1857. A. J. CAIN.
J. H. McKernan, Esq., Indianapolis, Ind.”

What designation of creditors, or further instructions, if any, were made or given by *A. J. Cain*, do not appear from the record. But it does appear, that, on the 3d of *April*, 1857, four days after the deposit of the claims by *A. J. Cain*, creditors began to file their demands, against *John Cain*, with *Mr. McKernan*. A list of them appears in the record. Seven creditors appear to have filed on the 3d of *April*, and, on that day, *McKernan* executed to *Thomas M. Smith*, who filed the first three claims, an instrument of the following tenor:

“Received, *Indianapolis*, *April 3d*, 1857, of *Thomas M. Smith*, two notes as follows:

“\$100. *Indianapolis, January 14, 1852.*

“Sixty days after date, I promise to pay to the order of *Thomas M. Smith & Son*, 100 dollars, value received, negotia-

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ble and payable at the branch at *Indianapolis*, of the *State Bank of Indiana*, without any relief from the valuation or appraisement laws.

JOHN CAIN."

"*Indianapolis*, January 14, 1852.

"One day after date, for value received, I promise to pay to *Thomas M. Smith*, or order, 45 dollars and 57 cents, without any relief whatever from valuation or appraisement laws.

"\$45 57.

JOHN CAIN."

"Also, an account of *William Smith*—amount, 29 dollars and 50 cents."

"*W. H. Talbott*

v.

Thomas M. Smith,
as indorser of *John Cain*.

} In the *Marion Circuit Court*,
Indianapolis, October 20th, 1852.

Amount of judgment.....	\$454 28
Interest 4 years, five months, 8 days.....	120 92
Costs accrued	9 23

\$584 43

"The first note, principal, 100 dollars, and interest of 30 dollars and 53 cents, and second note of 45 dollars and 57 cents, with interest, 17 dollars and 60 cents; the account of *William Smith*, of 29 dollars and 50 cents, and the above judgment to be paid out of the proceeds of an account of *Sellers and Friendly*, of *Oregon Territory*, for 1,165 dollars, for goods furnished the Government, for the use of the *Oregon* volunteers in the *Jakina Indian war*, when collected by the undersigned, who holds a power of attorney for that purpose.

"J. H. McKERNAN."

The filing of claims continued. By the 1st of *February*, 1858, twenty-five claims, amounting to 5,126 dollars and 50 cents, had been placed in the hands of *McKernan*. Between

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the 1st of *February* and the 8th of *December*, 1858, thirty-one more claims were filed, amounting to 2,382 dollars. This division of the list of claims is prefaced thus: "To come out of the next bond." Between the 8th of *December*, 1858, and the 23d of *September*, 1859, eighteen more claims were filed, amounting to 1,845 dollars and 85 cents. This third division of the list of claim is prefaced thus: "To come out of next bond." It thus appears that the aggregate of claims upon *John Cain*, filed with *McKernan*, was 9,354 dollars and 35 cents.

The record is not explicit as to the amount of war claims deposited with him by *Andrew Jackson Cain*. The amount he deposited on the 30th of *March*, 1857, is not stated. On the 5th of *August*, 1857, he made a second deposit of 2,382 dollars, and, on the 29th of *June*, 1859, he made a third deposit of 1,698 dollars; and it is clear, from the record, that he deposited, in all, over 7,500 dollars, but as to the exact amount, the record does not show very satisfactorily.

These claims, at the time of their deposit, had not been allowed by the Government, but might be subsequently, in whole or in part, and some of them in greater proportion than others. In what terms certificates were given by *Mr. McKernan* to creditors, other than as set out above, does not appear; nor does anything further appear as to his powers in the premises. It appears that *McKernan* received, in gold, upon the 1,165 dollar claim, mentioned in the instrument given to *Smith*, 776 dollars and 67 cents, and that he received, upon all the claims deposited with him, 4,791 dollars and 82 cents, but when he received the amounts does not appear; nor whether he is yet to receive a further sum upon them or not. It appears that a greater proportion of some than of other of the claims had been paid, but why is not disclosed.

The instrument above set out, given by *McKernan* to *Smith*, was assigned by the latter to *Mayhew*, accompanied by an

McKernan v. Mayhew et al.

order on *McKernan* to pay the amounts due upon it to *Mayhew*.

Mayhew brought this suit, upon that instrument, against *McKernan*, to recover the amount he had received on the 1,165 dollar claim, mentioned in it, and he recovered below.

The instrument was assignable in equity, so that the assignee could sue upon it, in his own name, under the code. It may be observed, also, that an order, drawn upon a particular fund, amounts to an equitable assignment of such fund, or the amount of it specified in the order. Byles on Bills, side p. 74, note to 3d Am. ed.

It may be further observed, that, if a demand was necessary before suit, which we do not mean to intimate, a demand was made; and, as the suit is upon the instrument, not upon the order, it was not necessary to show an acceptance of the order.

The proper parties, we may also remark, are before the Court.

The present suit was brought by *Mayhew*, on the instrument given by *McKernan* to *Smith*, alleging the reception by the latter of the money on the 1,165 dollar claim, specified in it.

One paragraph of *McKernan's* answer was this:

"That so far as the claim, set forth in the complaint, is now made by the plaintiff, the writing or agreement described in the complaint was given without any consideration whatever."

This paragraph was rightly held bad on demurrer. It does not deny that the instrument was given upon a consideration to *Smith*. It is a sort of negative pregnant. Indeed, it is scarcely intelligible as to any meaning. It says, that so far as the plaintiff's claim is "*now made*," it is without consideration. It would seem that the instrument must have

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been given upon a consideration or not, whether sued on *now* or *then*.

But the main question in the cause arises thus: The instrument given by *McKernan*, on which the suit is founded, after acknowledging the reception of the claims filed, states that the claims specified are "to be paid out of the proceeds of an account of *Sellers* and *Friendly*, of *Oregon Territory*, for 1,165 dollars, for goods furnished the Government, for the use of the *Oregon* volunteers," &c., and is signed *J. H. McKernan*, not as agent for any other party, but simply in his own name.

A receipt, it may be remarked, may, in addition to its character as receipt, contain an agreement. *Pribble v. Kent*, 10 Ind. 325. *McKernan* claims, that, notwithstanding his agreement states that the payment to *Smith*, *Mayhew's* assignor, was to come out of a particular, specified war bond or account, he is entitled to aver in answer, and show by evidence, that it was not the understanding that it was to come out of that specified bond, but, *pro rata*, with all *J. Cain's* creditors, out of the aggregate amount which might be collected on all the bonds deposited, at the time the receipt was given and afterwards, with him by *A. J. Cain*.

The importance of this question to the parties will be understood by a reference back to the account of the claims deposited by *A. J. Cain* with *McKernan*.

We think evidence could not be heard to prove such an understanding. The written agreement in question is as clear and explicit as words can make it. It is without ambiguity, and needs nothing extrinsic to aid its interpretation. It is not like the contract in a case cited, where a person acknowledges the receipt of goods or merchandise, "to be forwarded." Such a contract is ambiguous, and needs to be read in the light of extrinsic, surrounding facts, to arrive at its meaning. Forwarded—when, where, how, in what capacity, &c.?

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In the case at bar, *McKernan* has in possession, and in expectation, several war bonds, not yet allowed by the Government, with a contingency existing as to whether they will be, or, if any of them, which, and how much thereof, which claims he is to collect, as far as can be done, and pay the proceeds to *J. Cain's* creditors. The thing is in his hands. A creditor comes in to deposit his claim. *Mr. McKernan* can say to him, I will give you an obligation to pay you your *pro rata* proportion out of what I collect on all the claims, less the expense of collecting, &c. Or he might say to him, and to such an agreement he might personally bind himself, if you will agree to take your chance for pay out of a certain specified bond, thereby relinquishing all right in the others, I will agree to pay you all I collect, up to the amount of your claim, out of that bond. If the agreement was made, it would be binding. Such is the agreement in question, in this case, on its face, and we think it can not be varied by parol evidence. See *Byles on Bills, supra*, side p. 27. If this contract can be varied by parol evidence, what is the contract that can not be? If an agent contract, upon a consideration, in his own name, even beyond his powers as agent, he may bind himself. *Ibid.* And see *Kendall et al. v. Morton*, at this term.

Per Curiam.—The judgment is affirmed, with costs, and 1 per cent. damages.

Thomas A. Hendricks, for the appellant.

N. B. Taylor and *Barbour & Howland*, for the appellees.

Bish et al. v. Johnson et al.

BISH *et al.* v. JOHNSON *et al.*

RAILROADS—CONTRACT.—Subscriptions to the capital stock of railroad companies, made since the taking effect of the act of *February 23, 1853*, authorizing the consolidation of such companies, will not be discharged or invalidated by the subsequent consolidation of the company in which they are made, but they will be held to have been made with reference to said law.

APPEAL from the *Grant* Circuit Court.

Per Curiam.—In this case proceedings supplementary to execution were instituted by appellants against the *Cincinnati and Chicago Railroad Company* and the *Cincinnati, Newcastle and Michigan Railroad Company*, and also against said appellee, to subject to the payment of judgments obtained by the appellants against said corporations, the proceeds of certain stock subscriptions made by said *Johnson* to the capital stock of the latter company, and remaining unpaid.

It is averred that the said subscription was made in *March, 1853*; that in *April, 1854*, said company last above named consolidated with the *Cincinnati, Cambridge and Chicago Short Line Railroad Company*, under the name first above set forth, and that afterwards, in *1854*, said company and the *Cincinnati, Logansport and Chicago Railroad Company* consolidated under the name first above set forth.

These facts appear in the complaint. An answer was filed by said *Johnson*, the second paragraph of which avers that the judgments, of which payment is sought, were obtained after said consolidations, and that said consolidations were "made against his wishes and consent." A demurrer was overruled to said second paragraph of the answer, which presents the only point in the case. This subscription was made after the act of *February 23, 1853*, authorizing the consolidation of railroad companies, and consequently must be viewed as having been made with reference to the said authority so

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conferred upon said corporations. Previous to the passage of said act it had been repeatedly held that a consolidation, without the consent of the stockholder, released him, &c. *McCray v. The Junction Railroad Company*, 9 Ind. 358; *Booe v. The Same*, 10 Ind. 93.

The judgment is reversed, with costs. Cause remanded. *J. Brownlee*, for the appellants.

GORDON v. NORMAN.

PRACTICE IN SUPREME COURT.—Where there is evidence which tends to sustain the finding of the Court below, this Court will not reverse the judgment of that Court for alleged error in refusing a new trial on account of insufficiency of the evidence.

APPEAL from the *Howard* Circuit Court.

Per Curiam.—Action by the appellee, who was the plaintiff, against *Gordon*, upon a note for the payment of 800 dollars. The note bears date *October* 18th, 1857, and was payable on or before the 25th of *December*, 1859, to one *Brittain Larue*, who assigned it to the plaintiff. Defendant answered that the note was given to *Larue* for a part of the purchase money of a tract of land, which is described, and which was sold by him to the defendant. It is averred that *Larue*, at the time of the sale, represented to defendant that there was of cleared land upon the tract between forty-five and fifty acres; and defendant, relying upon the representation so made, and believing it to be true, was induced to and did purchase said land at the price and for the sum of 3,000 dollars; when in truth there were but thirty acres of cleared land

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on said tract when it was so purchased, which *Larue*, at the time of said sale, well knew. And defendant, in fact, says that, by reason of the false representation so made, he has been damaged 300 dollars, which he claims to have deducted from the amount due on the face of the note. Plaintiff replied by a denial. The Court tried the issues and found for the plaintiff the full amount of the note and interest, &c. New trial refused and judgment.

The only error upon which the appellant relies for a reversal is, that the finding is not sustained by the evidence. We are not inclined to reverse upon that ground; because, having looked into the evidence, which is to some extent conflicting, we find that there was evidence which tended to support the finding of the Court, and that being the case, it was for the Court, sitting as a jury, to reconcile the conflict, and having done so, we will not disturb its conclusions.

The judgment is affirmed, with costs and 8 per cent. damages.

N. R. Lindsay, for the appellant.

WRIGHT *et al.* v. MACEY *et al.*

REFEREES—PRACTICE.—Where a controversy pending in Court is referred, by order of the Court, to three referees, the parties may agree to receive a report from one or more of them.

APPEAL from the *Marion* Circuit Court.

HANNA, J.—This was a motion by *Macey* for leave to amend the report of referees.

It appears, by the record, that prior to the 14th of *Novem-*

Wright et al. v. Macey et al.

ber, 1860, the parties had agreed to a reference of the matters in controversy in a suit, then pending in said Court, to three persons named. Two of them met, heard the evidence, and agreed upon the terms of a report. One of them had to go to *Cincinnati*, but it was agreed he should sign the report upon his return. These facts appear from affidavits and oral testimony heard on said motion. The report was filed, and judgment rendered thereon on the 14th of *November* aforesaid, with the signature of but one of said referees. In *May*, 1862, this motion was made and an order entered that the signature of the other referee should be affixed to said report then, and should operate as if made on said 14th of *November*, 1860.

It is argued that the powers of the referees ceased upon the return into Court of the report, and that therefore the action of the Court was erroneous.

The original order of the Court, directing the reference and report, is not in this record, and we can not therefore say whether the report was to be made at the first term after the reference or not; nor need we inquire in the right of the Court to permit the referee to affix his signature, for the reason that the only effect it could have, in favor of the party seeking to have it so affixed, was to render the report and judgment based thereon valid, in the event the Court had the right to make the order. We think it sufficiently appears that, without such signature, said report, &c., were valid. It is shown that it was filed by agreement of the attorneys of the parties with the one signature to it, and that judgment was entered therefor, so far as we are informed, without objection. Although three persons were by agreement of parties originally appointed in this case, yet, as only two of them appeared, it is shown that, by agreement of said parties, they took upon themselves the burden of the reference. When the report was made out, we suppose the parties could under the statute,

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(sec. 351, 2 R. S., page 117,) agree to a report from a still smaller number than two. That appears to have been done here.

Per Curiam.—The judgment is affirmed, with costs.

B. K. Elliott, C. Hamlin and J. Cowgill, for the appellants.

Wm. P. Fishback, for the appellees.

COOK'S ADM'R v. GIBSON.

TRESPASS—JURISDICTION.—The wrongful taking or detention of personal property is a trespass, in the general sense of the word, and, under § 15 of the justice's act, an action for such trespass, in the form of an action of replevin, may be brought, either in the township where the defendant resides, or where the trespass was committed, and process served throughout the county.

APPEAL from the *Marion* Common Pleas.

HANNA, J.—This suit was commenced before a justice of the peace for the recovery of the possession of personal property, to-wit: one horse, of the value of 50 dollars. The complaint contained an averment, "that said property is unlawfully detained by one *William Gibson* in said county, and as affiant is informed and believes in *Warren* township therein." There was a written motion to dismiss, "for want of jurisdiction," which was overruled. In the Common Pleas the motion was renewed and sustained.

The appellee contends, here, that although it was averred in the complaint that the property was unlawfully taken and detained, yet the plaintiff was really seeking to recover the value thereof only, and therefore the dismissal was correct.

There is nothing in the record informing us whether the

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objection was to the jurisdiction of the justice over the person or the subject matter. The appellant argues as if the action of the Court had been influenced by a supposed want of jurisdiction of the subject matter. The inference from the argument of the appellee would seem to be that the Court was controlled by the idea that there was no jurisdiction of the person. As to the first, it has been settled by the case of *Jocelyn v. Barrett*, 18 Ind. 128; and as to the other, there is nothing in the record which would preclude the existence of the fact that the defendant was, perhaps, a resident of the township where the suit was brought, even if it was a case of *assumpsit*.

The question is not therefore necessarily before us, whether this is an action of that character, or whether advantage could be taken by motion of the supposed defect.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Rand & Hall and *Joseph T. Roberts*, for the appellant.

Colerick & Jordan, for the appellee.

Ross' Adm'r v. KUMLER.

APPEAL from the *Clinton* Circuit Court. •

Per Curiam.—The appellee, who was the plaintiff, brought an action against *Henry Ross*, *John Ross* and *Pierson Ross*, who were the defendants. The object of the suit was to subject certain real and personal property to the payment of a judgment in favor of the plaintiff and against *Henry Ross*, who, it is alleged, conveyed said property to *John* and *Pierson Ross*, with intent to defraud his creditors. The Court tried

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the issues and found for the plaintiff. New trial refused and judgment.

The decision of the case depends upon the evidence which is all upon the record. And having examined it carefully, we are of opinion that its weight sustains the finding of the Court.

The judgment is affirmed, with costs.

R. P. Davidson, for the appellant.

181	206
206	404
21	306
186	606

WEST v. RAYMOND et al.

ATTORNEY—CONTRACT.—The purchase by an attorney from his client, pending litigation, of the subject matter of the litigation, is absolutely void.

CHAMPERTY.—The purchase of land, pending a suit concerning it, is champerty, and the purchase is void, if made with a knowledge of the suit, and not in consummation of a previous bargain.

APPEAL from the *Delaware* Circuit Court.

WORDEN, J.—*Andrew J. Shepherd* brought this action against *Raymond* and others, to recover possession of certain real estate, and to quiet his title thereto. The attorney by whom the action was commenced and conducted for *Shepherd* was *William R. West*, the present appellant. After the defendants had appeared and answered, &c., and while the cause was pending, *Shepherd* executed a conveyance of the property in controversy to *West*, and the latter caused himself to be substituted as plaintiff in the action instead of *Shepherd*. *West* had no interest in the property until his purchase from *Shepherd*. *West* gave *Shepherd* for the property 810 dollars in cash, gave him up a written contract for 150 dol-

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lars for his fee in the cause, and was to pay back taxes from 15 to 35 dollars. The cause then progressed to final judgment in the name of *West* as plaintiff. There was a trial, verdict and judgment for the defendants.

West appeals and assigns numerous errors. Had the cause progressed to termination in the name of *Shepherd* it would have been necessary to examine the errors assigned, but as, from the view we take of the law as applied to the case, *West* could not have recovered in any event, such examination would be useless. The judgment below was right, inasmuch as *West*, on his own showing, had no valid title.

The purchase by *West* of the property in controversy, while it was in litigation, he being the attorney of *Shepherd* conducting the suit, we think was void, and no title passed by the conveyance. Says Chancellor *Kent*: "It is the settled doctrine in *England* and in *New York*, and probably in most of the other States, that the purchase of land pending a suit concerning it, is champerty; and the purchase is void, if made with a knowledge of the suit, and not in consummation of a previous bargain. The statutes of Westm., 1 c. 25; Westm. 2 c. 49, and particularly the statute of 28 Edw. 1 c. 11, established that doctrine, which became incorporated into the common law." 4 *Kent's Com.*, 10th ed., p. 530. This doctrine was acted upon to the fullest extent in the case of *Jackson v. Ketchum*, 8 John. 479. We have adopted the English statutes above mentioned. *Scobey v. Ross*, 13 Ind. 117. If the doctrine above stated be correct to the full extent stated, the sale and conveyance to *West*, pending the litigation, would have been void, even if he had not been the attorney of *Shepherd*. But it is not necessary that we should, nor do we in the present case, decide that a sale to any person of property pending litigation concerning it, would be void. We place the case upon the ground that the sale was made to the attorney of *Shepherd* pending the litigation. We take it to be

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settled in this State that a contract between an attorney and client, by which the attorney is to have all or a part of the subject matter of the litigation, is void. *Scobey v. Ross, supra*. The only doubt we have had on the point is, whether such contract should be held void only as between the parties, and good as to third persons, or absolutely void. We conclude, however, that such contract is absolutely void. The case of *Simpson v. Lamb*, 40 Eng. Law & Eq. Rep., p. 59, is in point here. There the plaintiff had recovered a verdict against the defendant for 50 £. damages. After verdict and before the judgment the attorney of the plaintiff purchased the plaintiff's interest in the verdict, giving him therefor the full amount of the verdict. Judgment was afterwards rendered on the verdict. Subsequently the defendant recovered a judgment against the plaintiff, in another action; and it was sought to set one judgment off against the other. The attorney having purchased the verdict as above stated, resisted the set off, claiming the judgment thereon as his own. Lord Campbell, C. J., during the argument of the cause, made the following observation: "This is not a controversy between the client and the attorney, nor does the client complain of the purchase by the attorney, and as between third parties, I should be strongly inclined to think such a purchase might be valid." But after advising, the Court held the purchase void, and set off one judgment against the other, notwithstanding that the controversy was not between attorney and client, and that the client did not complain of the purchase. We quote the following passage from the opinion of the Court as pronounced by Lord Campbell: "Independently of the statutes referred to in the arguments, restraining the purchase of property in suits, particularly by persons concerned in the administration of justice. Statute of Westminster, 1 c 25; Statute of Westminster, 2 c 49, and 23 Edw. 1 c 11, commented upon in 2 Inst. 483; it has been held in several cases,

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that no attorney can be permitted to purchase any thing in litigation, of which litigation he has the management; *Hall v. Hallett*, 1 Cox 134, and *Wood v. Downes*, and the authorities therein cited; and considering the situations in which the attorney and client stand to each other, it would seem, as was said in *Hall v. Hallett*, to be against the policy of the law to permit such a dealing by an attorney with the subject of a suit of which he has the conduct as the attorney, whilst the case is still undetermined by judgment, as that which is now in question before us, whatever might have been the case had the purchase been made by a stranger." The above case may be found reported in 90 E. C. L. R. 84.

West rightly failed to recover, because he had no title, whatever might have been the state of the case as between *Shepherd* and the defendant.

Per Curiam.—The judgment below is affirmed, with costs. *Thomas A. Hendricks* and *Oscar B. Hord*, for the appellant. *D. S. Gooding* and *Walter March*, for the appellees.¹

(1) The counsel for the appellees argue :

The sale and conveyance of land by a client to his attorney, pending litigation concerning it, are void, both for champerty and because they are against public policy. *Scobey v. Ross*, 13 Ind. 117; *Jackson v. Ketcham*, 8 Johns. 479; 10 Paige 362; 2 Denio 107; 1 G. & H. 415; 1 Cox 134, (Eng. Eq. R.); 40 Eng. L. & E. R. 559; 90 Eng. C. L. R. 84; 18 Vesey 120; 4 Kent's Com., 10 ed. 430 and notes; 1 Hoff. Ch. R. 421.

Sales and conveyances of real estate, made pending the adverse possession thereof, are void. 4 Ind. 164; 14 *id.* 163; 2 *id.* 577; *id.* 405; 1 *id.* 581; *id.* 481; 8 Blackf. 366; 1 *id.* 127.

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PITTS' Administrator v. PITTS.

Action by *A* against the estate of *B*, her father, on a note for 1,000 dollars, given by him in his lifetime, payable to her at his death. **Answer**, first, want of consideration, and second, that the note was given in consideration of *A*'s agreement to live with and keep house for her father, during his life, which she failed to do. **Issues.** Trial by jury. It appeared that she resided with, and kept house for, her father, six or seven years after her majority, and, when the note was given, in 1860, she agreed not to marry, but to take care of him during his life. She did not marry. The evidence was conflicting as to the amount and kind of services rendered by her for him, and as to the precise terms of their contract.

- Held**, 1. That, under the circumstances, the following instruction was proper: "If the note was executed in consideration that *A* should live with and keep house for her father during his life, and she, without sufficient cause given by him, or without his consent, left his service before his death, she would be entitled to recover the reasonable value of her service while she lived with him. But, if she left his service, with his consent, not obtained through her own misconduct, some time after the execution of the note, and no effort was made by him to recover possession of the note, or correct it, the jury will be authorized, in the absence of any evidence tending to show an abandonment of the contract, to find that it still existed, and that he waived the further performance of it on her part, and she will be entitled to recover the whole amount."
2. That the following also is correct: "If *A*, after her majority, continued to live with her father, as she had done previously, with no new duties or responsibilities, and was provided with necessaries, &c., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between them, before these services were rendered, that she should receive such compensation, and, if the note was given for such past services, and there was no such understanding between them, she can not recover. But, if the note was given for such past services, the fact that it was given, will raise a presumption that there had been a

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previous understanding between them, that such compensation should be made, and, unless such presumption is overcome by evidence, that no such understanding existed, she will be entitled to recover."

APPEAL from the *Marion* Common Pleas.

DAVISON, J.—*Martha Ann Pitts* who was the plaintiff, sued *George W. Pitts*, administrator of the estate of *Stephen Pitts*, deceased, upon a promissory note given by his intestate. The note is in this form:

"\$1,000.

Indianapolis, March 20, 1860.

"For value received, I promise to pay, at my death, to *Martha Ann Pitts*, 1,000 dollars, without any relief whatever from the appraisement laws.

STEPHEN PITTS."

Defendant answered:

1. No consideration.
2. The note was made in consideration of the promise of the plaintiff to live with *Stephen Pitts*, and manage his household affairs from the date of the note until his death, she being his daughter, and having been previously living with him as one of his family. And defendant avers that the plaintiff, immediately after the making of the note, and before his decease, left his house, and, at all times thereafter, failed to live with him, and take charge of his household affairs; wherefore the defendant says that the consideration of the note has failed, &c.
3. The note was obtained from *Stephen Pitts* by undue and improper influence, in this, that when it was so obtained, he was old and infirm in mind and body, and felt dependant upon others for society and comfort, which was well known to the plaintiff, who, by threats that she would leave him, induced him to make the note.

Plaintiff replied by a denial. The issues were submitted

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to a jury, who, in answer to interrogatories propounded to them, at the instance of the plaintiff, found specially as follows:

1. The note was made in consideration of services already rendered, and to be rendered, by the plaintiff to her father.

2. There was no positive agreement how long the plaintiff was to serve; but the note was never revoked by the father, and he admitted that the absence of the plaintiff, on a certain occasion, was temporary, and that her service was satisfactory to him up to the time of his death.

3. The plaintiff left her father, before his death, only temporarily. It was with his consent. She did not quit his service.

4. There was no evidence of an express agreement; but, from the fact that the note had been given for past and future services, we presume there had been a previous understanding or agreement between the plaintiff and her father.

The jury also found generally for the plaintiff, and assessed her damages at 1,150 dollars. Motion for a new trial denied, and judgment, &c. The causes for a new trial, as relied on by the appellant, are thus assigned:

1. The verdict is not sustained by the evidence, and is contrary to law.

2. The Court erred in its instructions to the jury, and also in refusing to instruct, as moved by the defendant.

It appeared in evidence, that the plaintiff had resided with her father, *Stephen Pitts*, some six or seven years after she arrived at full age, and that when the note was given, *March* the 20th, 1860, she agreed not to get married, and to remain with him and attend to his affairs until his death, and one witness, *Mary Waldo*, who was present when the note was executed, testified, that that was the consideration of the note. But there was other testimony which tended to show that it was given for past as well as future services. And,

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further, there was evidence tending to prove, that the plaintiff, about one month prior to the death of her father, with his consent, left his house, he, at the time she left, stating that he had rented, or was about to rent, his farm to his son, *Frank Pitts*; that he intended to make a visit to *Tennessee*, and when he returned from his visit, he wished to have no care, and would live in town. And there was, also, evidence which tended to prove, that the plaintiff, in the year 1855, took charge of the family of her father, and attended to his household affairs, until she left, as aforesaid, in *August*, 1860.

The defendant, at the proper time, moved thus to instruct the jury: "If the note sued on was given in consideration that the plaintiff should live with, and keep house for, her father, *Stephen Pitts*, the maker, during his life, and if the plaintiff left the service of *Stephen Pitts* before his death, she is only entitled to recover the reasonable value of her services while she lived with him, viz: from the time the note was made until she left, and this, whether she left voluntarily, or with or without his consent."

The Court refused this instruction, but gave the following: "If the note in suit was executed in consideration that the plaintiff should live with, and keep house for, her father, during his life, and if the plaintiff, without sufficient cause given by her father, or without his consent, left his service before his death, she will only be entitled to recover the reasonable value of her services while she lived with him. But if the plaintiff left the service of her father, with his consent, not obtained through her own misconduct, some time after the execution of the note, and no effort was made by him to recover possession of the note, or cancel it, the jury will be authorized, in the absence of any evidence tending to show an abandonment of the contract, to find that it still existed, and that he waived the further performance of the contract on

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her part, and she will be entitled to recover the whole amount."

These instructions, as we understand them, assume that *Pitts*, the maker of the note, consented to the plaintiff's leaving his service. If that was the case, he waived any further performance by her of the contract, and the result is, she was entitled to recover the full amount of the note. Indeed, the rule is well settled, that "no one, who waives or dispenses with the performance of a contract, can rely on a failure to perform it, either as a defence or a cause of action, for no one can complain of a default which he has caused or sanctioned." 1 Smith's Leading Cases, p. 466, and authorities there cited. See, also, *McKee v. Miller*, 4 Blackf. 222. It is true, had the transactions between the plaintiff and her father resulted in a rescision of the entire contract, she would only be entitled to recover the value of her services performed under it; but here no such rescision occurred, because, having consented to her leaving his service, he himself had no right to rescind the contract, or to consider it as having been rescinded by her. *McKee v. Miller*, *supra*; *Patterson v. Coats*, 8 Blackf. 500. We perceive no error in the instruction given by the Court, or in its refusal to give the one moved by the defendant.

Again, the defendant moved this instruction: "If the plaintiff, after arriving at the age of 21, continued to live, as previously, in the family of her father, and was provided with necessaries, &c., as one of the family, she would not be entitled to recover any other compensation for services rendered while so living with him, unless there was an express understanding between them, before the services were rendered, that she should receive other compensation. If, then, there was no such understanding between the plaintiff and her father, and if the note in question was given in consideration of such past services only, such consideration does not support it, and the plaintiff can not recover."

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This instruction was also refused. And the Court instructed as follows: "If the plaintiff, after she arrived at full age, continued to live with her father, as she had done previously, with no new duties or responsibilities assumed in the family by her, and was provided with necessities, &c., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between her and her father, before these services were rendered, that she should receive such compensation, and if the note was given for such past services, and there was no such understanding existing between them, she can not recover. But if the note was given for such past services, the fact that it was given, will raise a presumption that there had been a previous understanding or agreement between the plaintiff and her father, that such compensation was to be made, and, unless such presumption is overcome by evidence, that no such understanding existed, the plaintiff will be entitled to recover."

The instruction just recited seems to be correct. The note itself is a contract which, *prima facie*, imports all the essential elements of a valid consideration; and, it seems to us, that the consideration, thus implied, can not be impeached by mere proof that the note was given for past services. To allow such proof to subserve the purposes of the defendant, would impose on the plaintiff the burden of proving that which the note, on its face, imports. Hence, the jury had a right to infer, from the note itself, that the services for which it was given were performed under an agreement between the plaintiff and her father—that for the performance of them, she was to be compensated. The rulings upon the two last instructions were, in our opinion, not erroneous.

The evidence is upon the record, and is to some extent conflicting. Still there was evidence tending to support both the special and general findings, and we are, therefore, not inclined to disturb the verdict.

Moore v. Ennis.

Per Curiam.—The judgment is affirmed, with costs, and 8 per cent. damages.

S. Major, for the appellant.

Lucian Barbour and *J. D. Howland*, for the appellee.

MOORE v. ENNIS.

PLEADING.—The decision relates to the sufficiency of a pleading, and can not be briefly stated.

APPEAL from the *Morgan* Circuit Court.

DAVISON, J.—The complaint, in this case, consists of two counts. The first alleges that *Moore*, who was the plaintiff, sold and delivered to *Ennis*, one buggy, at the price of 85 dollars, which he received, and, in consideration therefor, promised to pay the plaintiff, on or before the 25th of *December*, 1861, the said 85 dollars, which, with interest thereon, remains unpaid, &c. The second count is upon a note alleged to be in this form:

“\$85.

July 4, 1860.

“On or before the 25th of *December*, 1861, I promise to pay *J. I. Moore*, or order, 85 dollars, for value received of him, without any relief from appraisement laws.

ANDERSON ✕ ENNIS.”

It is averred, that, in *January*, 1862, the defendant fraudulently obtained possession of said note; and the defendant, though the plaintiff has demanded the same, has refused to deliver it to him, and still retains possession thereof, &c. Wherefore the plaintiff demands judgment for 100 dollars, &c.

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Defendant answered:

1. By a denial.
2. Payment of the note.

3. Defendant admits the purchase of the buggy, and that he executed said note therefor. But he alleges, that, soon after he purchased the buggy, he sold it to one *Joseph Price*, for 95 dollars, for which sum *Price* executed to him, defendant, his note, payable on or before the 25th of *December*, 1861; that on said 25th of *December*, defendant demanded the 95 dollars of *Price*, which sum, or so much, thereof as was necessary, defendant wanted to pay to the plaintiff on the 85 dollar note; that *Price* failed to raise the money, but, instead thereof, went and made certain negotiations with the plaintiff, whereby he, *Price*, obtained possession, and became the owner, of said note for 85 dollars, given by defendant to plaintiff, which note he, *Price*, on the same day, presented to defendant, in part payment of his, *Price's*, note, which defendant accepted, and then and there delivered to *Price* the said note for 95 dollars. Wherefore, defendant says that the note, executed by him to plaintiff, is fully paid, &c.

Plaintiff demurred to the third paragraph of the answer; but the demurrer was overruled, and then he replied by a denial. The Court tried the issues, and found for the defendant, and, having refused a new trial, rendered judgment, &c.

The action of the Court, upon the demurrer to the third reply, is assigned for error.

It is argued that that pleading is objectionable, because it does not allege that the plaintiff was paid, or in any way compensated, for his buggy, or his note. In terms there is no such allegation; but it does allege, that "*Price* made certain negotiations with the plaintiff, whereby he obtained possession, and became the owner of the note." This appears to be sufficient. If *Price* became the owner of it, the amount stated on its face was, in effect, paid to the plaintiff, and his

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title to it became thereby divested. Hence, it was not essential to the validity of the pleading, to allege the means employed by *Price* to obtain the note, or how much he paid for it. That he became the owner by "certain negotiations with the plaintiff," was sufficiently explicit.

The next assigned error is, that the finding is not sustained by the evidence. There is no such averment, as required by rule 30 of this Court, that "this was all the evidence given in the cause." But we have carefully examined the evidence as it stands on the record, and are of opinion that its weight sustains the finding.

Per Curiam.—The judgment is affirmed, with costs.

W. A. Harrison and *W. S. Sherley*, for the appellant.

Buskirk & Broadwell, and *McDonald, Roache & Lewis*, for the appellee.

TRAGER, Trustee, &c. v. THE STATE ex rel. GOUDIE.

COMMON SCHOOLS, LOCATION OF—PRACTICE.—Under the provisions of the common school law of March 11, 1861, the inhabitants of a township, or any portion of them, may petition the trustee for the location of an additional school district, or the erection of a school house, and, if the prayer of their petition is refused by him, they may appeal to the school examiner, and, if he reverse the decision of the trustee, it will be the duty of the latter to grant the prayer of said petition, and, if he still refuse, he may be compelled to do so by mandate. Acts 1861, p. 70, § 9, *et seq.*; *id.* p. 75, § 25.

APPEAL from the *Franklin Common Pleas*.

DAVISON, J.—*Joseph Goudie*, for himself and others, instituted a proceeding, by mandate, against *Jacob Trager*, as trus-

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146	294
21	317
155	157
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164	308
21	317
166	140
21	317
171	292

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tee of *Brookville* township. The affidavit, which is the complaint, upon which the proceeding is founded, alleges substantially these facts :

Goudie, and others, to the number of thirteen, citizens of sections numbered 36, 25 and 34, in *Brookville* township, *Franklin* county, having children entitled to the privilege of attending common school, by petition, represented to the trustee of said township, that they had been, for some time past, deprived of the benefit of such school, on account of the great distance, and asked him, amongst other things, to constitute them into a district for school purposes, and to adopt the school house they then held in the corner of *Joseph Goudie's* field, and to grant them their share of the school funds. The prayer of their petition was refused by *A. B. Herndon*, the then trustee of the township, and an appeal from his decision was granted by him to the School Examiner of the county, who, having received the appeal, decided that an additional school be located, as prayed for by the petitioners, to which they were to be attached for school purposes, and that in the then next distribution of the school revenue, said school be placed on an equal footing with other schools of the several districts of the township. It is alleged that *Herndon*, as such trustee, while in office, failed to comply with the decision of the School Examiner, and that *Trager*, the present trustee, has also refused compliance therewith, &c. The relief sought is, that a writ of mandate issue, requiring *Trager*, as such trustee, to locate a school, as prayed for by the petitioners, according to the decision of the School Examiner, &c.

To this complaint, the defendant, *Trager*, appeared and answered :

1. That the proceedings recited in the complaint are without authority of law, and void; that school districts can not be changed, or sites for new school houses located by or on

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petition simply, but can only be done by or at a regularly called meeting of the inhabitants of the district, &c.

2. That defendant, and his predecessors in office, have established a sufficient number of schools in said township, for the education and convenience of all the children therein; have built, and otherwise provided, a sufficient number of school houses for the convenience and education of said children, and the location of the school prayed for would be a useless expenditure, &c.

3. The school house already erected in the district is sufficiently commodious and conveniently located for the accommodation of all the children of the district, &c., and there is not a sufficient number of children therein to support two schools, &c.

4. That after the filing of the petition referred to in the complaint, and the decision of the School Examiner, the director of the district, in which said petitioners reside, regularly called a school meeting of the inhabitants therein, at which meeting they, the inhabitants, determined to retain in that district all the territory embraced within its boundaries prior to the decision of the School Examiner; and, further, they, at said meeting, petitioned the trustee, through their director, to disregard the decision of the Examiner, &c.

Plaintiff demurred to the answer. The demurrer was sustained, and final judgment was accordingly given, &c.

The first defence involves the main inquiry in the case. Were the proceedings, recited in the complaint, inoperative and void? If they were not, then it was the duty of the trustee to carry into effect the decision of the School Examiner. An act to provide for a general system of common schools, &c., points out the duties of the trustee. It says: "He shall take charge of the educational affairs of the township, and establish, and conveniently locate, a sufficient number of schools therein, for the education of the children

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therein." Acts, 1861, p. 70, sec. 9. Now, if, in the opinion of the inhabitants of the township, or any portion of them, the trustee had failed to locate a sufficient number of schools, as required by the act, we perceive no reason why they should not have the right to call on him, by petition, and thus present a case for his consideration. Such a proceeding does not appear to be in conflict with any of the provisions of the act, and is, it seems to us, consistent with a proper execution of the law. It is true, as contended, that the inhabitants of the township, at their regular school meetings, have a right "to memorialize the trustee in reference to the removal or erection of school houses, and upon any other subject connected with their school township." *Id.* p. 75, sec. 25. But that right is not, by the statute, made exclusive, and hence the trustee may, in our opinion, legally act upon a petition presented to him by persons who are inhabitants of the school township, though it did not originate at such regular meeting. Section 39, of the act to which we have referred, provides, that "appeals shall be allowed from decisions of the trustees, relative to school matters, to the School Examiners, who shall receive and promptly determine the same, according to the rules which govern appeals from justices of the peace to the Common Pleas or Circuit Courts, so far as such rules are applicable; and their decisions of all local questions, relating to the establishment of schools, and the location, building, repair, or removal of school houses, or transfer of persons for school purposes, shall be final." *Id.* p. 78. This section very clearly gave the School Examiner jurisdiction, on the appeal to him from the trustee, of the subject-matter of the petition; and, if his decision is final and operative, and we think it is, the paragraphs of the answer do not, nor does either of them, constitute a bar to the action.

An objection is made as to the sufficiency of the affidavit, upon which the proceeding is based; but, having looked into

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it, we are of opinion, that, for the purposes of this suit, it is substantially sufficient. The judgment must be affirmed.

Per Curiam.—The judgment is affirmed, with costs.

George Holland, Thomas B. Adams, C. C. Binkley, and Fielding Berry, for the appellant.

J. M. Johnston and W. V. Kyger, for the appellees.

31	331
195	559
21	331
143	237

BEARD et al. v. BEARD.

JURISDICTION—PERSONAL JUDGMENT—ALIMONY.—It is competent for the Legislature to authorize the courts of the State to render personal judgments for alimony, in divorce cases, upon constructive notice, against citizens of the State, but it can not authorize such judgments, upon such notice, against the citizens of another State, unless the latter submit to the jurisdiction of our courts by voluntarily appearing to such actions therein.

SAME.—If a resident of this State, whilst temporarily absent, is constructively notified of the pendency of such an action, such service is void, because the same should have been made by copy of process left at his last place of residence; but, if he is a non-resident, then no personal judgment for alimony, if rendered against him, will be operative or valid, unless made so by his voluntary appearance to the action.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—In *December, 1856*, *Dorothea Beard* obtained a divorce and 1,000 dollars alimony against her husband, *John Beard*. In *May, 1859*, said *Dorothea* filed an amended complaint against said *John*, on the judgment for alimony, and also sued out a writ of attachment, and process of garnishment against the *Indiana Central Railway Co.*, alleging that

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that company was indebted to said *John Beard* in a large sum of money, viz: 4,000 dollars.

In *September*, 1859, said *John Beard* appeared to the suit, and demurred to the complaint. The demurrer was overruled and *John* answered, averring that when he married said *Dorothea*, he was a citizen of *Wayne* county, *Indiana*; that he afterwards removed to and resided in *Indianapolis*; that he lived with his said wife between one and two years, during which time she, by her extravagance, nearly ruined him pecuniarily, and was determined to quite effect that object; that to save himself he left her and went to *Illinois* to live with his children by a former wife, and, afterwards, went from there with them to *Kansas*. He avers that the charges in her complaint for a divorce were false and fraudulent, but he does not allege that there was any fraud in the trial of them in the Court. He avers that no notice, except by publication against him as a non-resident, was ever given him, and that he did not have actual notice of the judgment against him till six months after it was rendered.

A demurrer was sustained to his answer, and judgment was rendered against him, and also against the railroad company as garnishee for the amount of the judgment for alimony, &c.

The answer of the railroad company was a good bar to a judgment against her; but issue was taken on it, there was judgment against her after a trial, and the evidence is not in the record. See *The Junction Railroad Company v. Cleany*, 13 Ind. 161.

The only question in the case is this: could a valid personal judgment be rendered against *Beard* in a divorce suit upon constructive notice, that is, as we define it, in our State, so far as we resort to such notice at present, by publication. 16 Ind. 429; see *The King v. Chandler*, 14 East. Rep. 267. We have a general statute that "no personal judgment shall be

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rendered against a defendant constructively summoned, who has not appeared to the action." 2 G. & H. p. 229, sec. 395. And we have a further statute that, "parties against whom a judgment has been rendered without other notice than the publication in the newspaper herein required, except in divorce cases, may have such judgment opened, and be let in to defend at any time within five years." 2 G. & H. 66, sec. 43.

But on the same day, and later thereon, according to the order of the acts in the statute book, was passed the statute regulating divorces; and that statute provides that divorces may be granted upon notice by publication, and that the Court, in such cases, may render a decree or judgment for alimony, which must be a personal judgment. 2 G. & H. 348, *et seq.*; *Rice v. Rice*, 6 Ind. 100. And, on the 4th of *March*, 1859, more than six months before the defendant appeared to this action, even, he not having initiated any steps on his own part to vacate it, though he had actually known of its existence for two years, the Legislature enacted that subsequent judgments for alimony, in divorce cases, might be opened at any time within two years. 2 G. & H. p. 348. Now, the clear inference from the act of the defendant in lying by so long after knowledge of the judgment, without taking any steps to set it aside for fraud, or otherwise, is that he did not claim the right to do so; and the clear inference from all the acts of the Legislature on the subject is, that judgments for alimony in divorce cases, though rendered upon publication, are binding and valid as personal judgments, though judgments generally when rendered upon such notice are not so.

The question, then, is one of power, on the part of the Legislature to authorize such a judgment.

In governments where the Legislature, as in case of the British Parliament, is possessed of the supreme power of the State, it can hardly be doubted that it would be competent

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for such legislatures to authorize personal judgments upon constructive notice. Such judgments would not be held void as against natural right. See *Sturgis v. Fay*, 16 Ind. 429. Says Chief Justice *Marshall*, in the case of *The Mary*, 3 Cond. Rep. 335, "it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served on the thing itself."

Nor are such judgments, where rendered against resident citizens of the State, void as against the course of the common or civil law. The common law provides for substituted or constructive service, where personal service could not be had. See the whole of chapter 8, in the first volume of *Daniel's Chancery Practice*, Perk. ed., commencing at p. 495, the subject of the chapter being, "of process to compel appearance." See, also, *George v. Fitzgerald*, 12 Louisiana Rep. p. 604, cited in *American Leading Cases*, vol. 2, p. 805; so in *Illinois*.

In *Welch v. Sykes*, 3 Gilman 197, Judge *Treat* says: "It is competent for each State to prescribe the mode of bringing parties before its courts. Although its regulations in this respect can have no extra-territorial operation, they are nevertheless binding on its own citizens." Now, though our government is not absolute, nor is the legislative power omnipotent, yet it is only restrained, in this particular, to the extent that no man shall be deprived of his property, &c., except by due course of law, which is construed to mean a trial according to the course of the common law. 2 Kent's Comm., 6 ed., p. 12 and notes; *Taylor v. Porter*, 4 Hill (N. Y.) R. 140. In *Borden against The State*, 6 Eng. (Ark.) Rep. 510, in speaking of the course of the common law, in obtaining personal judg-

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ments, without actual notice, and claiming that such judgments are not necessarily invalid, it is said :

“The common law proceeding of outlawry was inconsistent with such an idea to its full extent. The result of this proceeding was, in the first place, a judicial sentence by which the defendant incurred a qualified forfeiture of his lands and goods, and a suspension of his civil rights as a citizen ; and in the second place, it enables the plaintiff in a civil action, to the Court of Exchequer, or by petition, when his claim exceeded 50 £s, to obtain satisfaction of his claim by a sale of the property thus seized. And there is a strong case, as to a judgment of outlawry, cited by the Court in the case of *McPherson v. Corliff et al.*, 11 Serg. & Rawle, 438, to sustain the proceedings of the probate courts, as to the sale of real estate, wherein these proceedings were unsuccessfully attacked on the ground that it had proceeded under a total mistake as to the real parties in interest, the Court having proceeded under the idea that a family of children, who were really bastards, were the heirs of the deceased. The case is cited from 10 Vin. (Title Record, c. pl., 2 from Br. E. pl. 78). “Record of outlawry of divers persons was certified in the Exchequer, among whom one was certified outlawed and was not outlawed, and that his goods forfeited were in the hands of *I. N.*, and upon process made against him he came and said he was not outlawed, and parcel of the record came by chancery out of B. R. into the Exchequer ; and *Green*, justice of B. R., came into the Exchequer and said he was not outlawed, but that it was misprison of the clerk. *Skipworth* said, though all the judges would record the contrary, they shall not be credited, when we have recorded that he is outlawed. *Quære*, what remedy is for the party ? It seems it is a writ of error, inasmuch as there is no original against him, but only record of outlawry without original. (Br. Record, pl. 49.) And in the same book, pl. 4, cites Br. Error, pl. 78, it is said

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the diversity is this, that a man may assign error on a thing separate or out of the record, but he can not falsify it."

In *Scotland*, there seems to have been a practice, in early times, of summoning debtors to pay debts by blowing a horn, out of which practice arose warrants of horning, and judgments of horning were rendered. Touching these judgments the above case from *Arkansas* proceeds: "There is a case in 4 Bing. 686, (*Douglass et al., assignees, v. Forest ex. of Hunter*,) where, in an action in *England*, on one of these judgments of horning, it was contended that the judgment should be held as a nullity, upon the principal of universal justice, as the counsel expressed it, there having been no notice previous to the judgment of horning. But the *English* Court refused to so hold, and said: 'On this question we agree with the defendant's counsel, that if these decrees are repugnant to the principles of universal justice, this Court ought not to give effect to them. But we think these decrees are perfectly consistent with the principles of justice. If we hold that they were not consistent with the principles of justice, we should condemn some of the proceedings of our own Courts.'" But see 4 Black. Comm. 283, note. But these are judgments obtained, as we take it, against resident citizens of the State, who may be temporarily concealed or absent, so that actual notice can not be given to them. *Story*, in his *Conflict of Laws*, shows this. Sec. 557 *et seq.* In *England* the doctrine of expatriation is not admitted, and the absentees remained British subjects. These judgments against citizens may be valid, and enforced by the judicial tribunals of the State where rendered, and might be respected by other States of the Union, under the constitutional provision requiring faith to be given in other States to the judgments of each, because, in these judgments, jurisdiction is legally obtained, though they might or might not be respected by the Courts of foreign nations, who act upon international courtesy, not

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upon the binding obligation of law. See *Jeter v. Hewitt et al.*, 22 How. (U. S.) Rep. 352. Thus, Chief Justice *Marshall*, in *Rose v. Himely*, 2 Cond. Rep. 98, says: "Of its own jurisdiction, so far as depends on municipal rules, the Court of a foreign nation must judge, and its decision must be respected. But, if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the Prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all."

◁ But, notwithstanding a State may authorize its Courts to render personal judgment, upon constructive notice against its citizens, it can not, as we think, authorize such a judgment, upon such notice, against a citizen of another State, resident in such other State, unless such citizen submits himself to the jurisdiction of the Court in which the action against him is instituted, by voluntarily appearing in person or by agent. ▢

Says *Mr. Wheaton*: "The practice which prevails, in some countries, of proceeding against absent parties," [foreigners] "by means of some formal public notice, like that of the *viis et modis* of the Roman civil law, without actual personal notice of the suit, can not be reconciled with the principles of international justice." *Law. Wheat. Int. Law*, p. 288. Again, he says, "the judicial power of every State may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, wherever the cause of action may have originated." *Id.* 285. And again: "The judicial power of every State extends to all civil proceedings *in rem*, relating to real or personal property within the territory." *Id.* 280.

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But a State can not give its laws or jurisdiction an extra-territorial operation upon citizens or property of another State. *Sturgis v. Fay*, 16 Ind. 429; *Roche v. Washington*, 19 Ind. p. 59; *Eaton and Hamilton, &c., Co. v. Hunt et al.*, 20 Ind. 457; and see same vol. p. 492. "The authority of every judicial tribunal, and the obligation to obey it, are circumscribed by the limits of the territory in which it is established." 2 Burge Conf. 1044, cited in 2 Am. Leading Cases, at p. 806.

[Now, in the case at bar, *John Beard* was a non-resident, or he was not. If he was a resident of the State, temporarily absent, notice by publication was not authorized by law, and was, therefore, void, under the State law. In such a case, that is, of temporary absence of a resident of the State, notice must be given by leaving a copy of process at his last place of residence.] *Johnson v. Patterson*, 12 Ind. 471; *Sturgis v. Fay*, *supra*. [If he was a non-resident, then the Courts of this State could render no personal money judgment against him, though the judgment for divorce, acting simply upon the contract, and for its dissolution, would be operative.] *Wilcox v. Wilcox*, 10 Ind. 436, and cases cited. [The plaintiff proceeded against *John Beard* as a non-resident, he never submitted to the jurisdiction of the Court, and jurisdiction, therefore, to render the judgment for alimony against him was not obtained.] 2 Am. Leading Cases, p. 805, *et seq.*; *Harris v. Hardeman*, 14 How. (U. S.) Rep. 334; *Webster v. Raid*, 11 *id.* 437; *Williamson v. Berry*, 8 *id.* 495. *John Beard* was a non-resident. The right of expatriation exists between the States and the judgment in question would have been worthless in *Kansas*. *Arcy v. Ketchum et al.*, 11 How. 165. It ought to be here. It was not obtained by due course of law, with right of jury trial. The judgment against *John Beard* for alimony is reversed, as is also, of consequence, the judgment against the *Indiana Central Railway Co.* How it

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would have been, had the attachment formed a part of the original suit for divorce, we have not inquired.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Newcomb & Tarkington, for the appellant.

JOHNSON v. THE STATE.

CRIMINAL LAW AND PRACTICE—EVIDENCE.—In a criminal trial upon indictment, after the State has introduced her testimony, and the defendant has introduced his, but has not attempted to impeach the witnesses produced by the State, it would be error to allow the State to introduce testimony as to the general moral character, or standing for integrity, of her witnesses. The character of a witness is presumed to be good until impeached.

APPEAL from the *Knox* Circuit Court.

WORDEN, J.—The appellant, together with four others, was indicted for the murder of *George Purcell*.

The appellant was tried, convicted, and sentenced to imprisonment in the State Prison for life.

On the trial of the cause the State introduced and examined as a witness one *William F. Smith*. After the defendant's evidence had been introduced, the general character of said *Smith* not having been impeached, the State, by way of rebutting, introduced a witness who was acquainted with the general moral character of the witness, *Smith*, and offered to prove what that character was, but this evidence, on objection being made by the defendant, was excluded, and, as we think, rightly. But the Court permitted the same witness and several others, to testify as to *Smith's* "standing for integrity."

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To the introduction of this evidence exception was taken, and it was one of the grounds for which a new trial was asked. We are of opinion that the Court erred in admitting the evidence. Proof of the witness' "standing for integrity" was only an indirect mode of proving his general moral character, evidence of which the Court had excluded.

The character of the witness not having been impeached, it was incompetent to support him by evidence of his general moral character, or that which is equivalent to such evidence. *Prewitt v. Cox*, ante, page 15. In addition to what is said in the case above cited, we quote the following passage from the opinion of the Court in the case of *Rogers v. Moore*, 10 Conn. 18: "To discredit the stories of witnesses, is a part of the business of almost every trial; and the methods to which the ingenuity of counsel will resort to effect this, are various. Sometimes it is done by a critical cross-examination; sometimes by the contradictory testimony of others; and frequently by an impeachment of the general character of the witness. But if the credibility of a witness is impaired, otherwise than by an impeachment of his general character, as if it be shown that he is under the influence of partiality or prejudice; and, therefore, an issue is to be joined and tried upon his general reputation for truth, it would very much embarrass the progress of trials. And this can not be necessary, because the law presumes the general character of a witness to be good until it shall be impeached."

Per Curiam.—The judgment below is reversed.

John Baker, for the appellant.

Oscar B. Hord, Attorney General, and *R. A. Clements*, Prosecuting Attorney, for the State.

Cummings et al. v. Sharpe et al.

CUMMINGS *et al.* v. SHARPE *et al.*

MARRIED WOMEN.—The income or proceeds arising from the separate real estate of a married woman can only be subjected to the payment of her debts, contracted during coverture, by a proceeding in equity for that particular purpose, and not by an ordinary common law action and judgment against her.

APPEAL from the *Cass* Common Pleas.

HANNA, J.—Suit on a note. It was averred, among other things, that said female defendant is and was, at the time she executed the note, the wife of her co-defendant; that she is in the habit and practice of making contracts in her own name, and without the co-operation of her husband; that he is insolvent; that she owns property in her separate right, and all they use and occupy belongs to her; that the payees of the note furnished goods, merchandize and necessities to the defendants for their joint use and benefit, for which said female defendant had contracted and agreed to pay, and executed said note, alone, on closing up said account, upon which she had made various payments, &c.

There was a demurrer to the complaint overruled, and judgment taken against the female defendant alone, upon a trial by the Court, on an issue made by the general denial filed by the female; her husband filed no answer. It is not shown whether the property held by her was real or personal, nor how it was acquired. The evidence is not in the record. The judgment is in the usual and ordinary form against the female defendant, as if she were sole.

Some parts of the complaint would indicate that the pleader had intended to proceed, as in equity, to subject the separate property of the wife to the payment of the debt, but this appears in the sequel to have been abandoned and a judgment as at law taken against her separately.

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This could not have been done before the enactment of our present statutes; and the simple question is, whether said statutes have changed the rule upon the subject.

It has been held that, as to the separate real estate of the wife, she holds the same now without the exclusive power of alienation. 1 G. & H. Stat. p. 375, § 5; *Cox's Adm'r v. Wood*, 20 Ind. 54. It has also been held that, under § 5, acts 1853, 1 G. & H. p. 295 and note, the same rules and limitations exist as to personal property held by her, if acquired by the modes prescribed in said statute, to-wit: by "descent, devise or gift." *Reese v. Cochran*, 10 Ind. 195. This is in accordance with the common law.

Upon the supposition that it may have been real property that was owned by the female, in the case at bar, and that such fact was disclosed by the evidence, the question is, whether such income or proceeds as might arise therefrom would authorize a proceeding and judgment as a law against the female.

We are of opinion our statutes were not intended to, nor have they, changed the common law rule upon that subject. The mode in which such proceeds could be reached is indicated in the case in 20 Ind. cited. This would involve a proceeding as in equity.

It is not necessary for us to pass upon the question attempted to be raised, whether the separate property of the wife is liable, in such proceeding of an equitable character, for her contracts made as herein stated.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

J. W. Robinson, for the appellant.

Broadhurst v. The State.

BROADHURST v. THE STATE.

CRIMINAL LAW AND PRACTICE.—An information for a felony must show that the felony, on a charge of which the defendant is alleged to be in custody, is the same felony for which the information is filed.

APPEAL from the *Gibson* Common Pleas.

WORDEN, J.—Information against the appellant and one *Franklin Broadhurst*, for the larceny of a pocket book, and 5 dollars in silver coin, the property of *Samuel D. Wallis*.

To give the Court jurisdiction, it was alleged as follows:

“That *Franklin Broadhurst* and *Nathaniel Broadhurst* are now in the custody of the sheriff of said county of *Gibson*, on the charge of having feloniously stolen, taken and carried away, on said 8th day of *March*, A. D. 1862, at and in the county of *Gibson*, and State of *Indiana*, the personal property of one *Samuel D. Wallis*; and, further, that the said *Nathaniel Broadhurst* and *Franklin Broadhurst* have not been indicted by the grand jury of the county of *Gibson* aforesaid, for said offence.”

Trial, conviction and judgment that the defendants be imprisoned in the penitentiary for five years.

The information is fatally defective in not alleging facts sufficient to give the Court below jurisdiction. It should have appeared from the information, either by direct averment, or from the facts alleged, that the defendants were in custody on a charge of the same felony for which the information was filed. *Justice v. The State*, 17 Ind. 56. This does not appear from the information before us. The defendants might have been in custody on a charge of the larceny of the “personal property of said *Samuel D. Wallis*,” and yet not on a charge of the larceny of the pocket book and money in question.

Davidson et al. v. Nebaker et al.

Per Curiam.—The judgment against *Nathaniel Broadhurst*, who alone appeals, is reversed.

McDonald & Roache, for the appellant.

Oscar B. Hord, Attorney General, for the State.

SHARPE v. HARDING et al.

APPEAL from the *Marion* Common Pleas.

Per Curiam.—The judgment in this case will be affirmed for the reasons given in *King v. Brewer*, 19 Ind. 267. The facts of each case, and the law arising upon them, being, in effect, the same.

The judgment is affirmed, with costs.

J. L. Ketchum, for the appellant.

R. L. Walpole, for the appellees.

DAVIDSON et al. v. NEBAKER et al.

JUDGMENT—ACTION.—A judgment is a debt of record, and an action will lie to recover it, whether the judgment is foreign or domestic, and notwithstanding the plaintiff may have a remedy on the judgment, in the Court where it was rendered, by execution or otherwise.

APPEAL from the *Warren* Common Pleas.

WORDEN, J.—This was an action by the appellees against the appellants, upon a judgment recovered by the plaintiffs

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against the defendants, in the Circuit Court of the *United States* for the State of *Indiana*. Judgment for the plaintiffs.

The ground assumed for a reversal is, that the Court below had no jurisdiction, because there was no reason shown why the plaintiffs could not have availed themselves of the benefit of their judgment, in the Court where it was rendered, by issuing execution thereon or otherwise, and, hence, that there was no necessity for suing thereon.

A judgment is a debt of record, and we have no doubt an action will lie to recover such debt, whether the judgment be a foreign or a domestic one, although the plaintiff might have a remedy on the judgment, in the Court where it was rendered, by execution or otherwise. *Houghton v. Raymond*, 1 Sand. 682; *McGuire v. Gallagher*, 2 Sand. 402; *Church v. Cole et al.* 1 Hill 645; *Pennington v. Gibson*, 16 How. (U. S.) 65; *The White River Bank v. Downers and Trustees*, 29 Verm. 332; *Chandler v. Warren*, 30 Verm. 510; *Ames v. Hay*, 11 Cal. 12; *Canfield v. Miller*, 13 Gray 274; *Burton v. Stewart*, 11 Ind. 238.

Per Curiam.—The judgment below is affirmed, with costs, and 2 per cent. damages.

Gregory & Harper and *Tyler & Ristine*, for the appellants.
J. P. Usher, for the appellees.

POWELL et al. v. THE CITY OF MADISON et al.

CITY OF MADISON—TAXATION.—Under the charter of the city of *Madison*, pork, owned by non-residents of the city, which had been brought to said city by them, to be slaughtered, cured and stored there, subject to their order, will be liable to municipal taxation whilst it remains in said city, and it will be the duty of the person,

21	335
140	319
21	335
164	57

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in whose possession it is, to furnish a list thereof for taxation in his name.

SAME.—Under the provisions of said charter, where a person is called upon by the assessor to furnish such list, and he prepares and delivers it to the officer, but the officer, whose duty it is to swear him thereto, neglects to do so, such oath will be thereby waived, and the officer will have no right himself to make such list, on the ground that such person had either neglected or refused so to do, nor, in any such case, would the common council of said city have any authority to order that additional property be placed upon said list; but such list, when deemed imperfect or dishonest, should be corrected in the mode prescribed in section 10 of the amendments to said charter.

TAXATION OF PERSONALTY.—Personal property, which exists in a substantial and corporal form, such as cured pork, &c., must have an actual *situs*, and is taxable wherever that *situs* is; but it seems that personal property of an intangible character, which exists in rights of action, such as debts, bank stocks, &c., has no *situs*, other than the domicile of the owner, and is therefore only taxable at the place of his residence.

TAXATION—CONSTRUCTION.—The provisions of a municipal charter, in reference to the mode of assessing and collecting taxes, must be substantially pursued, or the tax will be invalid, and can not be legally collected.

APPEAL from the *Jefferson* Circuit Court.

WORDEN, J.—Complaint by the appellants against the appellees, to restrain the collection of certain taxes. Demurrer to the complaint sustained, and judgment for the defendants.

The following is the case made by the complaint:

The plaintiffs, who were partners, were possessed of a pork house, at the city of *Madison*, and carried on the business of slaughtering hogs, and packing and curing the meat thereof, both for themselves and for others. During the winter of 1861 and 1862, they slaughtered, packed and cured the meat of hogs for other persons, who did not reside in the city of

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Madison, the meat being the property of the persons for whom the hogs were thus slaughtered, and held by the plaintiffs, subject to the order of said persons, to be delivered to them, or shipped to their order. At the time of assessing taxes for the year 1862, viz: in *May* of that year, the plaintiffs had in their possession, at their pork house, a large amount of the meat thus slaughtered, packed, &c., for others, amounting in value to over 55,000 dollars. In the month of *May*, 1862, the city assessor called upon the plaintiff, *Powell*, to furnish a list of the taxable property of the plaintiffs for that year, for the purpose of entering the same on the assessment roll. *Powell* furnished the assessor with a list of the real estate owned by the firm, and also personal property to the amount of 40,000 dollars, not including the pork above mentioned. The assessor received said list from *Powell* as and for the plaintiffs' list of taxables for said year, without requiring him to swear to the same, and it is averred that said list was substantially true and fair. Afterwards, the assessor, without the knowledge or consent of the plaintiffs, assessed them with the further sum of 60,000 dollars of personal property, making in all, for personal property, 100,000 dollars. After the plaintiffs had ascertained that the assessor had thus assessed them with the amount of 100,000 dollars of personal property, *Powell* went before a committee, appointed by the Common Council, for the purpose of correcting erroneous assessments, &c., and made out, under oath, a list of the personal property belonging to the plaintiffs, varying but slightly from that furnished to the assessor, as before stated, and not including the meat above mentioned. But the Common Council caused the duplicate assessment roll to be made out and delivered to *Wilson*, the collector, for collection, charging the plaintiffs with a tax on the 100,000 dollars of personal property. The collector has seized property, and is about to sell, to make the amount of taxes charged.

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It is, perhaps, but just to assume, that the 60,000 dollars assessed to the plaintiffs, in addition to the list furnished by *Powell* to the assessor, was assessed as the estimated value of the pork above mentioned; hence, three questions seem to arise on the facts stated, viz:

1. Was the pork taxable by the city?
2. If so, was it taxable to the plaintiffs?
3. Was the assessment properly made, so as to make the tax legally collectable?

Whether or not the pork was taxable by the city depends upon the powers conferred upon her by her charter. The charter of the city may be found in the local laws of 1848, p. 89, and an amendment in the local laws of 1849, p. 286. The 9th and 10th sections of the amendment are as follows:

"Sec. 9. That the assessor or collector, as the case may be, shall receive lists of taxable property from the persons owning the same, as directed in the 23d and 33d [sections] of the act to which this is an amendment, which bill shall set forth the real estate owned in the city by its number or other description, and value thereof, stocks, or interests in banks, railroads, steamboats, insurance offices, or other stocks absolutely paid for, or the amount paid thereon. The value of goods and produce not for export or in transit, owned or in possession of any inhabitants of the city, and the value of all ordinary personal property, together with money at interest, as also dogs, bitches, hogs, and other property named in the act of incorporation, all of which shall be subject to taxation by the order of the Common Council; and such owner of such property, money, or effects, or the agent thereof, shall sign his or her name to such list, and swear or affirm that it is a just and true list of all the property which they understand to be taxable for city purposes, and that the value put thereon is a fair and proper value to the best of their knowl-

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edge and belief, which list shall be certified by the assessor or collector, as aforesaid.

“Sec. 10. That if the list so furnished by the owner or possessor of such property as aforesaid, shall not be a true list of such person's property, or shall not have a fair value placed thereon, and such person shall be adjudged by the Mayor to have committed a fraud in thus delivering his list of taxable property, or by placing too low a value thereon, such person shall be fined double the amount of what the additional tax would have been if a fair list or value had been given, which fine shall be paid [into] the city treasury, as other fines are, or if it is adjudged that no fraud has been committed, but [that] it was an honest mistake in judgment, then the Mayor shall adjudge that the additional property or value be placed on the tax-roll, which shall be done accordingly: *Provided*, That [if] the Common Council shall not, in their order, specify a portion of the articles above enumerated as subjects of taxation, then such portion as may not be named by their class in such order, need not be put in a list as aforesaid.”

It will be seen by section nine of the amendment above set out that the city is authorized to levy and collect a tax upon “the value of goods and produce not for export or in transit, owned or in possession of any inhabitants of the city.”

That the pork in question was not exempt from taxation by reason of any supposition that it came within the terms “for export or in transit,” is settled by the case of *The City of Madison v. Fitch*, 18 Ind. 83.

The pork was owned by persons who were not inhabitants of the city, but was in the possession of the plaintiffs, who were such inhabitants. The pork being within the city, and thus in the possession of the plaintiffs, it comes within the terms of the statute and is subject to taxation, unless we adopt the fiction and apply it to the case, that the *situs* of personal

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property is the domicile of the owner. It may be true that for the purposes of taxation, the *situs* of such property as debts, corporation stocks and such intangibilities, may be regarded as the domicile of the owner. *The City of Evansville v. Hall*, 14 Ind. 27. But it does not follow that such is the rule in reference to property that has tangible corporeal qualities and must have an actual location. Property that has the substantial qualities of cured pork must have an actual *situs*; and we think both on principal and authority it may be taxed wherever found, without reference to the domicile of the owner. This subject underwent a very full examination in the case of *Hoyt v. The Commissioners of Taxes*, 23 N. Y. 224, and the decision there fully sustains the views above expressed.

But it is urged that, as the property was only in the city and in possession of the plaintiffs for a temporary purpose, it does not come within the law providing for taxation. It may be true that in many cases, as for instance, if any engine owned by a person residing elsewhere, should be sent into the city for repairs, or if a horse should be left by a farmer with a farrier in the city to be treated, a mere temporary possession by a person within the city, would not be regarded as a possession within the meaning of the law on the subject of taxation.

But, where the possession is of so permanent a character, and for so material a purpose as is involved in the slaughtering of hogs, salting and curing the meat, and holding the same until the owners order it shipped, or require a delivery to them, such possession, it seems to us, comes within the spirit and meaning of the law. We conclude that the property was taxable.

Was it taxable to the plaintiffs? The charter does not authorize the taxation of personal property owned by persons not inhabitants of the city, unless it is in the possession of an inhabitant, from which the inference may be drawn that it is

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to be assessed to the inhabitant having such possession. But this is not left to mere inference. The tenth section of the amendment speaks of the list "furnished by the owner or possessor of such property," &c. The entire provisions of the charter seem to contemplate that personal property in the possession of an inhabitant of the city should be assessed to him.

We come to the third question. Was the property properly assessed? This question, we infer, was not discussed below, as the counsel for the appellees has not noticed it in his brief, but it fairly arises in the record, and is relied upon by the appellants.

We think it safe to assume that the provision of the charter in relation to the mode of assessing and collecting taxes must be substantially pursued; otherwise the taxes can not be legally collected.

By the 16th section of the amendment to the charter, it is provided: "That in all cases when any person may refuse or neglect to furnish the list of taxable property as above required, or shall refuse to swear to the same, the assessor shall make out a list from the best information he can get, and shall also fix a valuation on the same to the best of his judgment." In the case before us, the plaintiffs did make out a list, which, although not sworn to, was received by the assessor as the list of property of the plaintiffs. The assessor had no right to make out a list on the ground that the plaintiffs had failed or neglected to do so. Nor had the assessor any right to make out such list on the ground that the plaintiffs had refused to swear to the same. When *Powell* furnished him with the list, he might and should have required him to swear to it. He was authorized to administer to him the oath. City Charter, section 23. By receiving the list from *Powell* without requiring it to be sworn to, he could not place the plaintiffs in the position of having refused to take the oath.

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We see no ground on which it can be claimed that the assessor had a right to make out the list and fix the valuation thereon.

Nor do we think the common council had any authority to order that the additional property be placed on the assessment roll.

By the 23d section of the charter, it was provided that the assessor should take from persons owning property, real or personal, a list of the same, with its fair valuation, "which valuation shall be final and conclusive for the purpose of levying taxes thereon by said city." Upon the failure or refusal of any person to furnish said list, &c., the assessor was required to search out the property and value the same, which valuation and assessment was also to be final and conclusive, except as to absentees and non-residents, who might apply to the common council for the correction of any such assessment, and the common council were authorized to do what to them might seem right in the premises. This is all the provision we find in the charter which authorizes the common council to regulate or correct assessments. Now, supposing the foregoing provision, in reference to the power of the common council, not to be repealed or modified by sections 9 and 10 of the amendment hereinbefore quoted, still the case before us does not come within the provision. We have seen, that the list and valuation furnished by the taxpayer was to be conclusive for the purpose of taxation. That made by the assessor against absentees and non-residents might be changed upon their application to the common council. But the assessor had no right to make such list and valuation unless the persons to be taxed failed or refused to make the same; so that in the case before us, the common council had nothing to do in the premises.

The mode of proceeding, where the list furnished is not a true list, or where the value placed thereon is not fair, is fully

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provided for by section 10 of the amendment. If the party furnishing the list has been guilty of a fraud, he is to be fined by the Mayor; "or, if it be adjudged that no fraud has been committed, but that it was an honest mistake in judgment, then the Mayor shall adjudge that the additional property, or value, be placed on the tax roll, which shall be done accordingly," &c.

Here there has been no adjudication by the Mayor; the mode prescribed by the statute for correcting the list has not been complied with, and the taxes on the additional 60,000 dollars worth of property can not be legally collected, because it has not been assessed in a legal manner.

It should, perhaps, be observed, before leaving the subject, that the 33d section of the charter authorizes the collector, where the assessor has failed to call for a list of taxable property, to call upon the tax payer for such list, and, upon his failure to furnish it, to make out such list in the same manner as the assessor is required to do. But the assessment in this case was not made by the collector, nor was it a case in which he was authorized to make it.

We are of opinion that, on the case made, the plaintiffs were entitled to restrain the city and her collector from the collection of the tax on the 60,000 dollars worth of property thus added to the list furnished by them to the assessor, because the same had not been assessed or placed upon the tax roll in the manner prescribed by the charter; and hence that the demurrer should have been overruled.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

C. E. Walker, for the appellants.

H. W. Harrington and *R. J. Bright*, for the appellees.

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MECHANIC'S LIEN—PLEADING.—In an action to enforce a mechanic's lien, a complaint against husband and wife, which sets out a note given by the former, and a sufficient notice of intention to hold a lien upon the house and lots as his property, and avers that he holds the property by an unrecorded title bond, fraudulently taken in the name of his wife, but paid for by him, and occupied by both, and that she stood by and encouraged the building of the house, &c., is not bad on demurrer.

PLEADING.—Where a written instrument, which constitutes the cause of action, is filed with, and made a part of, the first paragraph of the complaint, and, in the second paragraph thereof, it is alleged to be filed with the latter, and is referred to as already on file with the former, the latter will be sufficient.

PRACTICE.—A motion for a new trial below, or an assignment of error in this Court, on the ground that "the Court erred in all the instructions it gave, and in refusing instructions asked for by the appellant," is insufficient for not pointing out, with reasonable certainty, the particular instructions in which the Court is supposed to have erred.

NEW TRIAL—SURPRISE.—When the plaintiff, in an action, testifying in his own behalf, sustains the averments in his own complaint, where he had full knowledge of the facts, the defendant can not obtain a new trial on the ground that he was surprised by such testimony.

NOTICE OF LIEN.—As to the requisites of the notice of lien generally, and especially where the title to the property is held by a married woman, by an unrecorded conveyance, the reader is referred to the opinion at length.

APPEAL from the *Putnam* Common Pleas.

PERKINS, J.—This was a suit to enforce a mechanic's lien. It was founded upon two written instruments of the following tenor:

"\$150 70. Due *John Hensley* 150 dollars and 70 cents,

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without relief from valuation or appraisement laws, the same being for work and labor done and performed by said *Hensley*, in erecting and constructing a dwelling house, on lots 17, 18, 19, 20, 21, and 22, in block No. 3, in *Edwin J. Peck's* enlargement to the town of *Greencastle*, county of *Putnam*, and State of *Indiana*, for the undersigned. *February 20, 1861.*

“WILLIAM PECK.”

“*Mr. William Peck*: Take notice, that I, the undersigned, intend to hold a lien on the dwelling house erected and constructed by me for you on lots 17, 18, 19, 20, 21 and 22, in block No. 3, in *Edwin J. Peck's* enlargement to the town of *Greencastle*, in the county of *Putnam*, in the State of *Indiana*, for the sum of 150 dollars and 70 cents, according to due bill executed to me by you of same date herewith. *Greencastle, February 20, 1861.*

JOHN HENSLEY.”

“Received for record this 20th day of *February*, 1861, and recorded in mechanic's liens, at 4 o'clock, P. M. CLINTON WALLS, Recorder of *Putnam* county. Fee, 25 cents. Paid.”

The complaint alleges that *Peck* holds the property by title bond, taken fraudulently in the name of his wife; that *Peck* has paid for the property, and that his wife stood by and encouraged the building of the house, &c. She was made a defendant. The notice appears, by averments in the paragraphs, to have been written sixty days from finishing the work, &c. A second paragraph was filed on an account for work and labor, &c.; in building the house at the joint request of *Peck* and wife, &c.; alleging that *Peck* was the equitable owner, &c.; setting forth the notice of intention to hold a lien, &c.

Demurrers severally filed to the paragraphs were overruled. This was right. The paragraphs were severally good. The defendants answered by the general denial, and, specially, setting up breach of contract on the part of the plaintiff, set-off,

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payment, &c. Replies in denial. Jury trial. Verdict and judgment for the plaintiff, giving a lien on the property, with an order of sale, &c.

The evidence in the cause is contradictory, but it tends to show:

1. That the plaintiff built the house—a new house—on the premises described in the notice of intention, &c.

2. That the notice of lien was filed within sixty days after the work was done. The Court properly called the attention of the jury to this point, and they found the point proved.

3. That so far as the house was not finished, according to contract, it was the fault of the defendant, *William Peck*. The defendants occupy the house.

4. That *William Peck*, the male defendant, held the lots by title bond, made, nominally, to his wife, the female defendant, but that *William* paid for the property, had possession and control of the title bond, and was the real equitable owner of the property.

5. That, at the date of the note, the plaintiff and defendant had a settlement; and that, for the balance due thereon, the note was given.

On the evidence, we can not disturb the judgment. We will notice the other objections of the appellants to the proceedings below.

The complaint, at first, consisted of but a single paragraph. The issues were made upon that, and the cause continued. At a subsequent term, the Court permitted the plaintiff to file an additional paragraph. No continuance was asked by the defendants on account of the filing. The issues were regularly made up on the new paragraph. We see no abuse of discretion in the premises by the Court below. And the defendants were not injured because the evidence, verdict, and judgment, in the cause, were evidently upon the first paragraph, which is fully sufficient to uphold the final result.

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The notice of lien was filed with the first paragraph; and in the second it was averred to be filed with it also, and referred to as being already on file with the first paragraph. We think it was thus made a part of the second paragraph, and, in legal effect, filed with it.

Objections to instructions are not properly before us. In the notice for a new trial, objection was made to them as follows: "The Court erred in the charge it gave, and in refusing to give charges asked by the defendant." In the assignment of errors, that in relation to instructions is this: "The Court erred in all the instructions it gave, and in refusing to give those asked for by the defendants." These specifications are too general. See *Elliott v. Woodward*, 18 Ind. 183. Some of the instructions given, at all events, were right, and some of those refused were wrong.

On the trial the defendants offered to prove, that parts of the work done by the plaintiff were not worth full price, on account of defective execution. There was no issue to which such evidence was applicable, at least, upon the first paragraph—that upon which the cause was really tried and decided. The defendant, *William Peck*, had given his note on settlement for the work done, and some time after it was done, and the house had been taken possession of by him and his wife; there was no answer of fraud or mistake, and no pretense that there was any. How, then, could it be important that other witnesses should express their opinions of the value of the work? The parties had deliberately and voluntarily agreed upon that themselves. The note showed this upon its face.

One of the grounds assigned in the motion for a new trial is, "that the defendant was surprised by the evidence of the plaintiff as to the time when he swore he did the last work on the house." We can not see the excuse for this surprise. The plaintiff had instituted his suit to enforce the lien, averr-

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ing the facts entitling him to it; the law made him a competent witness to prove his complaint. The time of finishing the work was a very material point in issue, considered in connection with the filing of the notice of intention, &c.; and we do not well see how the defendants could be surprised by the plaintiff swearing to the material points in his own case. The defendants ought to have been prepared to meet the exact issues in the cause, made up by their own pleadings.

In the judgment there is an error. It was rendered jointly against the husband and wife, not only as to the sale of the property subject to the lien, but also personally. The evidence showed that the wife was properly but a nominal party, on account of her possible interest in the real estate held by the lien. The error is probably clerical, but it may have been judicial. Still, no objection was made below to the form of the judgment. The attention of the Court was not called to it. It may yet, perhaps, be corrected, by proceedings in the Court below, and, if so, should be so corrected, that no execution issue against the female defendant personally. Indeed, the judgment should have been simply *in rem*. See *Randolph v. Leary*, 3 E. D. Smith, 687. See *Denny v. Greater*, 20 Ind. 20, to the point that objection to the judgment should be made below.

The only remaining question to be noticed, arises in the fact, that the notice of intention to hold a lien was addressed to *William Peck*, and described a claim—a promissory note—upon said *William*, while the suit was against *William Peck* and his wife.

Touching this question, it may be observed, it is certainly doubtful whether the notice of intention to hold a lien need be addressed to any body; or, rather, whether it is not, by force of law, addressed to every body. The lien created by it does not, as in the case of a mortgage, arise by contract, but by operation of law. The notice is not an instrument

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inter partes. It does not have to be served on any body. It is to inform the public that the signer of it claims a lien, from the time of its filing, on a certain piece of property, for a certain amount, and, in the body of the notice, the amount of claim must be shown, the property on which the lien is claimed should be described, and probably the person or persons against whom the demand, as a debt, exists, should be named.

We now proceed to consider the question in its application to the case at bar. We may view it in several aspects.

In the first place, we will suppose *Mrs. Peck* to be the real beneficial holder of the title bond; yet it was not recorded; the plaintiff might have no knowledge, except as derived from parties. Now, we will suppose that *William Peck*, the husband, employed the plaintiff to build the house in question, representing himself as the equitable owner of the ground, (for the equitable title is all the lien will reach in this case.) Suppose, further, that the wife knew the belief upon which the plaintiff was acting, and concealed from him the fact of her title; in such case, she would be estopped, in a suit to enforce the lien, to deny that the title was in her husband, *William*. A married woman is subject to the doctrine of estoppel *in pais*. *Gatling v. Rodman*, 6 Ind. 289, is full to this point. Still, in such case, the wife would have been a proper party defendant with her husband, in a suit to enforce the lien.

Again: Suppose the title was really in *William Peck*, but that he and his wife jointly contracted with the plaintiff to build the house on *William's* land; will it be denied, that if two persons employ another to erect a building on the ground of one of them, the builder may enforce a lien upon the property as against the employer, who owns it? Nor would it prejudice the claim for the lien that both the employers were made defendants to the suit.

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A third view of the case, and that which seems to accord with the evidence given, is, that *William* is the real owner, but has the title fraudulently vested in his wife; that *William* contracted for the building of the house; that his wife knew the builder was acting in the belief that *William* had the equitable title, but still encouraged him to go ahead, concealing her own title; in such a case, can there be a doubt that the lien may be enforced, and that the wife might properly be made a party?

In *Hauptman v. Catlin*, 3 E. D. Smith Rep. 666, it is held, that the value of labor performed, and materials furnished upon and for the benefit of the separate real estate of the wife, may be made a lien on such property, irrespective of the question of the common law powers of the wife to contract, the proceeding to enforce a mechanic's lien being one *in rem*. See *Randolph v. Leary*, 3 E. D. Smith, *supra*. No other questions as to proper parties, or of power to sell the equity, are made in the case.

Per Curiam.—The judgment below is affirmed, with 1 per cent. damages and costs.

Voss & Cowgill, for the appellants.

Williamson & Daggy, for the appellee.

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APPEAL from the *Whitley* Circuit Court.

Per Curiam.—This was an action by the appellant, who was the plaintiff, against *Lakey*, to compel him to account and pay over moneys in his hands belonging to the plaintiff.

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Upon the issues there was a verdict for the defendant. New trial refused and judgment. The only ground assumed for a reversal is, that "the verdict is not sustained by the evidence."

We have carefully examined the evidence set forth in the record and find it, to some extent, conflicting; but we are of opinion that the weight of it is in support of the verdict. The record, however, contains no sufficient averment, as required by rule 80 of this Court, that "this was all the evidence given in the cause."

The judgment is affirmed, with costs and 5 per cent. damages.

Jenkinson & Brackenridge, for the appellant.

John Morris, for the appellee.

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JURISDICTION—RECOGNIZANCE.—A person, who has been indicted for felony and arrested in one county, but, by reason of the insufficiency of the jail thereof, is confined in the jail of an adjoining county, may apply, by petition for writ of habeas corpus, to the judge of the Court of Common Pleas of the latter county, to be there admitted to bail, and such judge may legally grant such writ, and direct the prisoner to be admitted to bail, in the penalty prescribed by the Court of the county where the indictment was found, and, if the prisoner execute such recognizance with surety, conditioned for his appearance at the next term of the proper Court, and the same be approved by the sheriff of the county in which he is so confined, such recognizance will be valid, although the day of the

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month on which said Court will meet may be incorrectly recited in such recognizance.

APPEAL from the Warren Circuit Court.

DAVISON, J.—The facts alleged in the complaint and the exhibits therewith filed are substantially these: At the *September* term, 1859, five indictments were filed in said Court against one *Chas. H. Hunter*, upon each of which he was required to give bail in 300 dollars; upon these indictments he was arrested, but failed to give the required bail; and the jail of *Warren* county, having been deemed insufficient, he was imprisoned in the jail of *Tippecanoe* county. While thus in prison he applied to the sheriff of the last named county to admit him to bail, who refused his application; but the said sheriff, in obedience to a writ of habeas corpus, took him before *Gustavus A. Wood*, the then judge of the Common Pleas Court of said county, and before said judge, with *John P. Hunter* as his surety, he entered into five several recognizances, each of which is in the form and to the effect following:

“STATE OF INDIANA, *Tippecanoe* county, *sc.*

“Be it remembered that on the 15th of *November*, 1859, before me, *Gustavus A. Wood*, judge, &c., personally came *Charles H. Hunter* and *John P. Hunter*, and jointly and severally acknowledged themselves to owe and be indebted to the State of *Indiana* in 300 dollars, to be levied of their respective goods and chattels, lands and tenements, if default be made in the following condition, viz: If the above named *Charles H. Hunter* shall personally be and appear before the judge of the Circuit Court, on the first day of the next term thereof, to be holden at the court house in the town of *Williamsport*, in said county of *Warren*, on the third *Monday* of *April*, 1860, then and there to answer unto said State on indictment for grand larceny, and not depart thence without

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leave, &c., then the above recognizance to be void, &c.; otherwise to be and remain in full force, &c.

“CHARLES H. HUNTER, [SEAL.]

“JOHN P. HUNTER, [SEAL.]

“Taken, acknowledged before and approved by me, *John M. Goodman*, Sheriff.

“GUSTAVUS A. WOOD, [SEAL.]

“Judge Common Pleas, *Tippecanoe* county.”

At the term of the *Warren* Circuit Court, next after the execution of the recognizances, *Charles H. Hunter* was duly called, but failed to appear, and, thereupon, judgment of forfeiture was duly entered, &c.

Process in the present case was, as to *Charles H. Hunter*, returned not found. The defendant, *John P. Hunter*, appeared and demurred to the complaint, but his demurrer was overruled. He then answered by five paragraphs; to each of which the plaintiff demurred. The Court sustained the demurrer, and rendered judgment against the defendant.

Against the validity of the complaint it is argued that the judge of the *Tippecanoe* Common Pleas had no authority to admit the prisoner to bail. We think otherwise. The recognizances are each in the penalty ordered by the Court. On account of the insufficiency of the jail of *Warren* county the accused was imprisoned in *Tippecanoe* county. See 1 R. S. p. 347, § 11. And the statute expressly provides, that “the judge of the Common Pleas Court, within his district, shall have power to issue writs of habeas corpus, and to discharge, recommit or hold to bail, as the exigencies of the case may require.” 2 R. S. p. 20, § 23. It is true no special order of the Court, directing the prisoner to be sent to the jail of *Tippecanoe* county, is alleged to have been made; but his petition for the writ of habeas corpus, which was filed with the complaint, and constitutes a part of it, distinctly avers that he

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was imprisoned in said county on account of ⁴the insufficiency of the *Warren* county jail, and prays that he be admitted to give bail, &c. This averment was enough to authorize the judge to hear the case made by the petition, and the result is the recognizances must be deemed operative and binding on the parties. There is, however, another ground upon which the appellant relies for a reversal. The recognizances required the accused to appear before the *Warren* Circuit Court, at the next term thereof, to be holden on the third *Monday* of *April*, 1860. And the fifth paragraph of the answer, to which a demurrer was sustained, sets up affirmatively that *Charles H. Hunter*, the accused, was at the court house in *Williamsport*, in the county of *Warren*, on said third *Monday* in *April*, in discharge of his recognizance, but the judge of the Court was not there, nor was the Court in session, and, therefore, he could not appear, &c. We will judicially notice, that the term of said Court next after the execution of the recognizances was, as directed by law, to commence on the fourth *Monday* of *April*, 1860, and that being the case, the condition of the recognizance could not be performed by *Hunter*, otherwise than by his appearance on the first day of that term. He bound himself to appear at the next term after the date of his contract, and having failed to do so he and his surety became liable on the recognizance, though on its face the time of the commencement of the term is inaccurately stated. 2 R. S. p. 213, § 790.

Per Curiam.—The judgment is affirmed, with costs and 1 per cent. damages.

W. P. Rodes, for the appellant.

Oscar B. Hord, Attorney General, for the State.

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MORTGAGE.—If a mortgage is executed merely to protect property in the hands of the mortgagor from his creditors, other than the mortgagee, the mortgagor retaining possession, and the right of disposition, and these facts appear upon the face of the mortgage, it would be fraudulent and void, as against other creditors, and should be so declared by the Court; and the same result would follow, if the same intention and facts were established by parol evidence or otherwise.

APPEAL from the *Floyd* Common Pleas.

HANNA, J.—Suit to recover possession of personal property taken and held by *Wilcoxson*, sheriff, by virtue of several executions against one *Weir*. The appellant had a judgment against said *Weir*, who was a manufacturer of and dealer in cabinet ware, &c. To secure the appellant said *Weir*, on the 16th of *July*, 1860, executed a mortgage “of all the furniture, &c., together with the lumber, tools, &c., used in carrying on the cabinet business now in and about the ware rooms of said *Weir*, situated on lots 17 and 18, &c., and all like property that may be in said ware rooms when demanded by said company.”

On the 20th day of *May*, 1861, another mortgage was executed to appellant by said *Weir* of like property in the “ware rooms, shop and lumber yard,” on said lots.

The appellant, claiming under these mortgages, demanded and obtained possession, of *Weir*, of the property in controversy on the same day on which the levy was made. The contest is, therefore, really between creditors of said *Weir*. There was a general denial, and agreement that all matters might be given in evidence. Trial by the Court; judgment for the defendant.

The Court found specially upon certain points; but gener-

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ally for defendant. Upon these findings the question arises which is presented for our consideration.

The Court found that the mortgages were executed to secure a *bona fide* debt, and properly recorded, and the second one covered property to the value of 1,200 dollars; that *Weir* remained in possession of the property included in each mortgage until *November*, 1861, selling manufactured articles as demand was made for them, to the amount of 175 dollars per month, after the execution of the first mortgage, and 150 dollars after the second, applying some of the proceeds to pay his debts, (but none to the liquidation of the debt secured by these mortgages,) some to pay mechanics in the manufacture, but the application of the balance does not appear affirmatively; that he kept up the store by replenishing the stock by manufacture and purchase of raw material, and in that way the stock was constantly changing; but, after the second mortgage, the purchase was confined to articles of hardware and veneering. The appellant had the opportunity to know the facts found, and appears to have limited their examination to the inquiry, whether he kept up his stock. There was proof that most, if not all, the lumber since the second mortgage, was the same, and a part (not specified) of the furniture. There was no evidence that a fraudulent purpose was contemplated in giving or receiving the mortgage, or that the same was made in bad faith, and no such finding is given, but the necessary consequence of the agreement limiting the demand in the latter clause of the mortgage, as sustained and defined by the proof, was to hinder, delay and defraud creditors, and the same is therefor considered void.

The first mortgage contained, in the latter part, the following clause: "Said *Weir* is to retain possession of the articles above described until the same are demanded by said insurance company, when he is quietly to yield the same, and if said property is levied upon by virtue of any execution, or said

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Weir executes any other mortgage on said property, that said company may demand and take into her possession said property."

Under the construction given to this clause, by the Court below, the said mortgagor could not take possession of said property unless an execution was levied or another mortgage executed, and as this might not happen, the right of possession, it is said, would remain in the mortgagor, and, therefore, said mortgage was not valid.

As to the second mortgage, it contained this clause: "Said *Weir* is to remain in the possession of the property herein described, until the possession thereof is demanded by said company, and the said *Weir* hereby agrees to deliver up to said company the possession of said property whenever the same is demanded by her. This mortgage is not to abrogate or annul any of the provisions of a mortgage heretofore executed by said *Weir* to said company, but is given as an additional security for said debt." During the progress of the trial, the appellant abandoned any claim under the first mortgage; it is therefore evident, that the Court below considered that the "provisions" of the first mortgage were carried forward into the second by the part thereof above quoted, and, under the proof, rendered it void, as, in law, calculated to "hinder, delay, and defraud creditors."

The latter part of the finding is somewhat obscure, but, we suppose, was intended to express the belief of the Court, that although, in point of fact, in the giving of the mortgage, the parties acted in good faith, and did not intend a fraud, the legal consequence of the provisions quoted, and the evidence of the acts of the parties, under said mortgages, had the effect to hinder, delay, and defraud creditors, and therefore render said instruments void. Was that conclusion correct?

We can not say, that, upon the face of the second mortgage, the Court could have declared, as a legal conclusion

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from an inspection thereof, that it was intended, or had the legal effect, to hinder or delay creditors. If the two mortgages should be construed together, it is not then so clear what interpretation should be placed upon the language employed. As no time was fixed by the mortgages, or either of them, when the debt, which they were made to secure, should be paid, the inference is pretty strong, that, by the first mortgage, the mortgagor had the right to retain possession, except in the two contingencies mentioned. Part of the language so employed is, it seems to us, without meaning, as used, if this is not the true construction. Even if the two instruments should be considered together, it is very doubtful whether the provisions in the first, upon which the appellee relies, are carried forward into the second by its terms. But these are points which, it appears to us, it is not necessary, in the case at bar, to definitely pass upon, in view of the finding of the Court. The substance of the latter part of the finding of the Court is, that although, in point of fact, no fraud was intended by the parties to said mortgages, yet the legal consequence of some of the provisions thereof, as sustained and defined by the proof, was to defraud creditors, &c. To what part of the proof the judge who tried the case had reference, we can not certainly say; but we suppose it refers to the acts of the parties, in regard to the management and disposition of the mortgaged property, during the time it was suffered to remain in the hands of the mortgagor.

It is manifest, that if a mortgage is executed merely as a cloak to protect property in the hands of a mortgagor from creditors, other than the mortgagee, the mortgagor still retaining possession, and the right of disposition, and these facts appearing upon the face of the instrument, they would, as a legal proposition, vitiate it; and a Court should so declare. If these facts exist, but are not thus apparent, the effect, which ought to be given to them, would be the same, when

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they are brought to light. This, we think, can be done by parol evidence. Proof of acts of the parties to the mortgage, in reference to said property, might be shown for that purpose—such as the disposition thereof by the mortgagor, and application of the proceeds to purposes other than the payment of the secured debt, with the knowledge of the mortgagee. *Freeman v. Rawson*, 5 Ohio St. R. 1, and authorities there cited.

If the mortgage should be made in good faith, and to cover a *bona fide* debt, still, if that, and the acts of the parties under it, are of the character above indicated, we can not see that their original good faith would divest the proceeding of its present legal effect, to hinder and delay creditors.

To what extent these principles may reach, we do not pretend to say, and only decide, that, in the case at bar, we can not, upon the record before us, disturb the judgment therein.

Per Curiam.—The judgment is affirmed, with costs.

William T. Otto, George V. Hawk, and R. M. Weir, for the appellant.

R. Crawford, H. Crawford, Thos. L. Smith, and M. C. Kerr, for the appellees.

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PLEADING—PARTIES—EVIDENCE.—*A* and *B* had been partners in business. Afterwards, *A*, *B* and *C* became partners in the same business. Still later, *A* retired from the firm, and *B* and *C* continued in partnership for some time, when they dissolved. Afterwards, *B* sued *C* for profits, received and not accounted for by him. *C* answered: 1. By denial. 2. Payment. 3. Claim for personal services. 4. That he had paid out all the profits made by *B* and

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C upon old debts of the firm of *A, B* and *C*. Demurrer to the 3d sustained. To the 4th, the Court held *A* a necessary party, and ordered that he be made a party, and continued the cause for that purpose. No steps were taken by *C* to make him a party before the next term. The cause was again continued for the same purpose, and under the same order. Still no steps were taken by *C* to make him a party. The Court, at the next term, struck out the 4th paragraph. Issues on the complaint and second paragraph of the answer. Trial and judgment for the plaintiff.

Held, 1. That, under the circumstances, it was not error to strike out the 4th paragraph of the answer.

2. That *A* was a necessary party under said 4th paragraph.

3. That, under the issues joined upon the trial, evidence of payments by *C*, for the use of *A, B* and *C*, was not admissible.

APPEAL from the *Marion* Common Pleas.

PERKINS, J.—Anciently, *Smith* and *Stevenson* were in partnership in the wheat and corn trade. Later, said *Smith* and *Stevenson* of the one part, and *Thomas B. Elliott* of the other, entered into partnership in the same trade, *Elliott* owning one-half of the partnership concern, and *Smith* and *Stevenson* the other. Later, to-wit: on the 5th day of *December*, 1860, *Elliott* and *Stevenson* formed a partnership in the same trade, as successors to *Smith*, and *Stevenson*, and *Elliott*, and continued the same till the 31st day of *January*, 1861, when, by mutual consent, a dissolution took place.

After the dissolution, *Stevenson* sued *Elliott*, for profits alleged to have been received by him, and not accounted for, amounting to 2,000 dollars.

Elliott, the defendant answered:

1. The general denial.

2. Payment over to *Stevenson* of his share of the profits.

3. In bar of the whole action, that he, *Elliott*, should be allowed 1,000 dollars more than *Stevenson*, in the accounting, for his personal services.

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4. That he, *Elliott*, had paid out all the profits, made by *Elliott* and *Stevenson*, upon old debts owed by the firm of *Smith* and *Stevenson* and *Elliott*.

5. Same as the fourth.

A demurrer was sustained to the third paragraph, and rightly, because it purported to bar the entire cause of action, when it was a bar but to a part of it.

As to the fourth and fifth paragraphs, the Court ruled, that if *Elliott*, the defendant, desired credit for payments alleged to have been made for *Smith*, *Stevenson* and *Elliott*, in the pending suit between *Stevenson* and *Elliott*, the latter must cause *Smith* to be brought before the Court as a party, that he might be heard in taking the account, &c., ordered accordingly, and then continued the cause to a subsequent term. At that term, *Smith* had not been brought before the Court, nor had any steps been taken, so far as the record shows, for that purpose. The cause was continued to another term, with the order upon *Elliott*, unrescinded, to cause *Smith* to be brought before the Court. The term to which the cause was continued came round, but, so far as appears, no steps had yet been taken to comply with the order of the Court as to *Smith*. Thereupon, on motion, the fourth and fifth paragraphs of the defendant's answer were stricken out. There were then left two paragraphs of the answer, viz: the general denial and payment. Issue was taken on the latter. A trial was had, resulting in a judgment for the plaintiff of 185 dollars. On the trial, the defendant offered evidence to support the fourth and fifth paragraphs of his answer, which had been stricken out, but the evidence was rejected. The evidence actually given on the trial is not of record.

The evidence offered of payment to the use of the firm of *Smith*, *Stevenson* and *Elliott*, was not admissible under an answer of payment to *Stevenson* of a claim due him individually.

The remaining question in the cause is: Did the Court do

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right in striking out the fourth and fifth paragraphs of the answer? If the Court had a right to require *Elliott* to cause *Smith* to be made a party and brought before the Court, and *Elliott* failed, without sufficient reason, to comply with the requirement, the Court had a right, inherent in it, as a Court, to strike out that part of *Elliott's* defence depending upon *Smith* being a party. We must presume, in the absence of any showing to the contrary, that *Elliott* unreasonably failed to comply with the order of the Court; as, if *Smith* was a resident of another county in the State, by neglecting to inform the Clerk to which county process should go, &c.

The question then occurs: Ought *Smith* to have been a party? The question stands thus: ...*Stevenson* sues *Elliott* for money alleged to be due on transactions between them. *Elliott* answers, true, I had money of yours in my hands, but the firm of *Smith, Stevenson* and *Elliott* owed *Berry & Co.*, and I have taken the liberty of paying out your money on that debt, and for which I claim a credit in this suit. *Stevenson* denies *Elliott's* answer. Now, to make out his case, *Elliott* must show that *Smith, Stevenson* and *Elliott* did not owe *Berry & Co.*; that there were not firm assets to pay the debt, &c.; but surely these matters could not be properly adjusted between the members of that firm in the absence of *Smith*. If, therefore, these matters could properly have been introduced into this suit, *Smith* should have been made a party. If they could not be introduced, then the Court below might have rejected them on motion or demurrer for impertinency. In either event, there could have been no error.

Whether the accounts of the firm of *Smith, Stevenson* and *Elliott* could, under any circumstances, be brought into this suit, is not clear; but, perhaps, a state of facts connected with insolvency of parties, might exist, that would justify the Court, in the exercise of general equity power, to secure the rights of parties, to take cognizance of them. See Ad-

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ams' Equity, side p. 228; Coll. on Part. 3d Am. ed. sec. 1,011; Barbour on Set-off, 189; 2 Story's Eq. p. 887. Our statute authorizes legal and equitable set-offs.

Per Curiam.—The judgment below is affirmed, with 5 per cent. damages and costs.

John L. Ketchum, for the appellant.

Frederick Rand and *Reginald H. Hall*, for the appellee.

LAWSON v. SHERRA.

PLEADING.—In an action upon a note, the complaint, to be sufficient, should contain an averment that the note remains unpaid.

PRACTICE.—In such an action, where the complaint avers that the note was made to an unmarried woman, who afterwards married, and then with her husband indorsed the note to another person, who indorsed it to the plaintiff, and the complaint is not denied under oath, it is not necessary, on the trial, for the plaintiff to prove said marriage and indorsement as alleged.

APPEAL from the *Decatur* Common Pleas.

DAVISON, J.—*Sherra*, who was the plaintiff, brought this action against *Lawson*, upon a promissory note, which, with the indorsements thereon, reads thus:

“\$800.

Milford, September 12, 1853.

“For value received, I promise to pay *Sarah Jones*, or order, 800 dollars nine years after date, with interest from date, and without any relief whatever from the appraisement laws.

JAMES LAWSON.

“Indorsed: I assign the within note to *Dyer Cobb* for value received, *February 10, 1863.*

PLEASANT MARTIN,

“*SARAH MARTIN.*

21	363
135	391
21	363
153	64

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"Indorsed: I assign the within note to *Michael Sherra*, without any recourse on me, *February 28, 1863.*

"DYER COBB."

It is averred that *Sarah Jones*, the payee of the note after its execution, intermarried with said *Pleasant Martin*, and that she, with her husband, assigned it to *Cobb*, who assigned the same to the plaintiff as aforesaid. Wherefore, the plaintiff demands judgment on said note against the defendant for 1,300 dollars, in accordance with its conditions. Defendant's answer consists of five paragraphs. Plaintiff demurred to the second, third and fourth. As to the second and fourth, the demurrer was overruled; but to the third it was sustained. The first paragraph is a denial. The issues were submitted to the Court, who found for the plaintiff, and, having refused a new trial, rendered judgment, &c.

Upon the trial the plaintiff gave in evidence the note with its indorsements, and that was all the evidence given in the cause. For a reversal the appellant assumes two grounds:

1. The complaint is defective, because it fails to allege that the note was unpaid.
2. The evidence is insufficient in this, that it fails to prove the alleged intermarriage of *Sarah Jones* and *Pleasant Martin*, or that *Sarah Jones* indorsed the note.

The form of a complaint on a note, as contained in the revision of 1852, includes an averment that it "remains unpaid." 2 R. S. (G. & H.) p. 373. And, it seems to us, that the form thus prescribed, should, in its substantial requirements, be pursued. Perhaps it would be sufficient to adopt the old form, viz: that the defendant neglected and refused to pay the note, or any part thereof. 1 Chitty's pl., 365, 375. It is, however, very clear that a pleading founded on a contract is never complete, either in form or substance, unless it alleges a breach. *Ketallis v. Myers*, 3 E. D. Smith 83. True,

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the plaintiff, though he avers the non-payment of the note, is not bound to prove as averred; but that, in point of law, is no reason why the averment should not be made. To illustrate, suppose a suit upon a bond conditioned for the conveyance of real estate, the complaint would be defective unless it averred a breach in the failure to convey, and yet if it did contain such breach, the plaintiff would not be required to prove it. We think the first ground of objection is well taken.

The second ground is: "That the evidence was insufficient; that it fails to prove the alleged intermarriage of *Sarah Jones* and *Pleasant Martin*, or that *Sarah Jones* indorsed the note. Under the pleadings in the cause such proof was not required. The complaint avers the intermarriage, and that *Sarah Jones* assigned the note by the name of *Sarah Martin*; but there is no pleading in denial of the assignment, verified by oath, and hence it was not incumbent on the plaintiff to prove its execution. *Patterson v. Crawford*, 12 Ind. 241. For the defect in the complaint the judgment must be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

Oscar B. Hord and *Cortez Ewing*, for the appellant.

B. W. Wilson, for the appellee.

BOUGHER *et al.* v. SCOBEE *et al.*

FORMER RECOVERY.—Where the same question is at issue between the parties in two successive actions, the judgment rendered for the defendant in the first is an absolute bar to a recovery by the plain-

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tiff in the second; but otherwise, where the questions at issue are essentially or materially different in the different actions, or under different pleadings in the same action.

SAME.—When a material question, involved in a subsequent suit, has been, under proper issues, determined in a prior action between the same parties, and such determination does not appear by the record of the judgment it may be shown by extrinsic proof.

APPEAL from the *Decatur* Circuit Court.

DAVISON, J.—The appellants, who were the plaintiffs, brought this action against *John S. Scobey* and *William Cumback* to recover certain notes, or their proceeds, alleged to have been placed in the hands of the defendants, as attorneys at law, for collection. The complaint consists of five counts. The first, third and fourth make no point in the case. The second and fifth are substantially as follows:

2. That the plaintiffs had placed in the hands of defendants, as attorneys, claims on divers persons, amounting in the aggregate to 6,000 dollars, which had been by them collected and of which they had paid the plaintiffs 4,147 dollars and 85 cents, leaving a balance of 1,852 dollars and 15 cents in their hands unaccounted for and unpaid; and that plaintiffs had made a demand on defendants for an accounting and payment, which was refused, &c.

5. That plaintiffs, in *October, 1854*, had in the hands of the defendants, as their attorneys, a large amount of claims, a list of which is referred to, which claims were all solvent, and in all amounted to 6,000 dollars, and which were all unaccounted for, and that plaintiffs, on, &c., at the office of defendants, demanded of them that they account to the plaintiffs for all their interest in said claims, but to do so they, the defendants, then failed and refused and still do refuse, &c.

Defendants demurred to this fifth count. The Court sustained the demurrer and the plaintiffs excepted. But to the second count, they answered:

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1. By a denial.

2. Payment.

3. That before and at the time of the bringing of the suit, the plaintiffs were indebted to the defendants 8,000 dollars, for money paid to plaintiffs, for services of defendants, as attorneys, rendered to plaintiffs in and about the prosecuting and defending divers suits for plaintiffs, at their instance and request, and for money paid, laid out, and expended in and about the business of plaintiffs, and for traveling expenses, hotel bills, postage, &c., a bill of particulars of which is filed, &c.

Plaintiffs replied by a denial. The Court tried the issues and found for the defendants. New trial refused and judgment. And thereupon the plaintiffs appealed to the Supreme Court, which Court, in its decision, says: "We are of opinion that the Court below erred in sustaining the demurrer to the fifth count, hence the judgment in that respect must be reversed. This error, however, does not effect the validity of the proceedings on the other counts, in reference to which we find no error that would cause a reversal. The judgment below is reversed with costs, so far as it regards the fifth count of the complaint, otherwise it is affirmed."

This decision, having been certified to the Circuit Court, the defendants answered said fifth count as follows:

1. Payment.

2. Set-off.

3. That in *May*, 1859, in this Court and in this case, an issue was joined on the second count of the complaint herein, between the same parties, which issue was then and there, by agreement, submitted to the Court for trial, and the same was then and there tried by said Court, and upon said trial the Court found the issue in favor of the defendants and upon such finding at said term, rendered judgment in favor of the defendants, against the plaintiffs, a copy of which judgment

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is herewith filed, &c. And defendants further say that the matters and things alleged in said fifth count are the same identical matters and things alleged and set up in said second count, which said judgment is in full force, &c.

To this third paragraph of the answer the plaintiffs demurred, but their demurrer was overruled and they excepted. Issues having been made, the cause was submitted to a jury, who found for the defendants; and the Court, having refused a new trial, rendered a judgment on the verdict.

The plaintiffs, upon the trial, moved thus to instruct the jury:

"1. A former trial is only conclusive as to the facts directly put in issue, and the finding of which must have been necessary to uphold the verdict.

"2. On the former trial in this case it was, under the issues, necessary for the plaintiffs to prove that their claim, or some part of it, had been collected before they could insist upon a recovery.

"3. The issues in the case now on trial do not require the plaintiffs, in order to recover, to prove collections, and when the issues are different, it devolves on the defendants to show, affirmatively, that the plaintiffs did not fail on account of that difference."

These instructions the Court refused, and thereupon instructed as follows:

"If the jury find that heretofore, in this Court, a trial was had under the issues made on the second count of the complaint, upon which trial there was a finding, and thereon judgment was rendered in favor of the defendants, which judgment is in full force and effect and not reversed, such finding and judgment, if proved, is a bar to a recovery under the issue of former recovery made on the fifth count of said complaint, and you should, if such proof is made, find for the defendants."

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The Court, in the instruction given, proceeds upon the assumption that the second and fifth counts of the complaint are, in substance, at least, identical. This, we think, was a mistake. The second count charges the defendants with having collected a certain amount of money upon claims placed in their hands, which they failed to pay over on demand; while the fifth is for failing, upon demand, to account for certain notes on solvent persons, which had been placed in their hands for collection. Thus, it will at once be seen, that the difference between the two counts is essential. Indeed, the Supreme Court, on a former hearing of this cause, so regarded these counts; otherwise, the judgment, as to the fifth count, would not have been reversed. *Bougher v. Scobey*, 16 Ind. 151. The rule is, "when the same question is at issue between the parties in two successive actions, the judgment rendered for the defendant in the first, is an absolute bar to a recovery by the plaintiff in the second." *Miller v. Maurice*, 6 Hill, 114; *Birkhead v. Brown*, 5 Sandf. 134. But here the material question, under the second count, was, whether the claims had been collected; while no such question could legitimately arise upon a trial under the fifth count. Nor was it incumbent on the plaintiffs, under the former, as it was under the latter, to prove the solvency of the claims. The two counts being thus essentially different, it was, in our opinion, error to instruct the jury that the judgment on the first was a bar to a recovery on the fifth. It is true, when a material question, involved in a subsequent suit, has been, under proper issues, determined in a prior action between the same parties, and such determination "does not appear by the record of the judgment, it may be shown by extrinsic proof." *Birkhead v. Brown*, *supra*; *The Washington, &c., Co. v Sickles*, 24 How. (U. S.) 333; *Hargus v. Goodman*, 12 Ind. 629, and cases there cited. But the instruction before us does not embrace that proposition; nor would it, if it did so, be legally

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correct, because each count presents a distinctive cause of action, and hence the issues in each could not be legitimately the same.

Per Curiam.—The judgment is reversed, with costs.

B. W. Wilson, for the appellants.

John S. Scobey and *William Cumback*, for themselves.

GRIFFIN v. WILCOX.

PROVOST MARSHAL—ARREST.—A Deputy Provost Marshal, directed by his superior officer to arrest and punish persons, not connected with the army, for retailing spirituous liquors, at their usual places of doing business, to soldiers, is not protected by such order, from liability to the arrested party, for damages on account of such arrest, because such order is illegal.

STATUTES CONSTRUED—CONSTITUTIONAL LAW.—The act of Congress of *March 3d*, 1863, assuming to indemnify officers for such arrest, is unconstitutional.

SAME—DAMAGES.—The right to damages to be recovered in civil actions of false imprisonment, is property, is a chose in action, and passes, in this State, to one's personal representatives at his death.

PRESIDENT OF UNITED STATES—HIS POWERS IN WAR.—The President of the *United States* has a right to govern, through his military officers, by martial law, when and where the civil power is suspended by force; in all other times and places the civil excludes martial law—excludes government by the war power.

HABEAS CORPUS, SUSPENSION OF WRIT OF.—Neither the President, nor the Congress, of the *United States*, can suspend the issue of the writ of *habeas corpus* by a State Court.

APPEAL from the *Marion* Common Pleas.

PERKINS, J.—The following general order was issued:

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"HEADQUARTERS DISTRICT OF INDIANA AND MICHIGAN,
Indianapolis, June 8, 1863.

Capt. Wilcox, Provost Marshal, Indianapolis:

"Captain: You will at once issue an order prohibiting the sale of liquor, by any party, to enlisted men. This order must be rigidly enforced. Any one violating it will be severely punished. I have noticed, with surprise, many intoxicated soldiers in our streets. This evil should and must be stopped.

Very respectfully,

Your ob't servant,

G. COLLINS LYON,

Major and Chief Provost Marshal,
District of *Indiana and Michigan.*"

Capt. Wilcox thereupon issued the following notice:

"OFFICE OF PROVOST MARSHAL,
Indianapolis, June 8, 1863.

"All persons engaged in the traffic and sale of spirituous and intoxicating liquors, within this city, are notified that they are strictly prohibited, from and after this date, from selling the same to any enlisted soldier. A violation of this order, by any person whomsoever, will be visited with severe punishment.

By order of

FRANK WILCOX,

Captain and Provost Marshal."

Joseph Griffin was arrested and imprisoned by Capt. Wilcox, for an alleged violation of the foregoing military order and notice. After his release, he commenced this suit in the *Marion Common Pleas*, against the captain, for false imprisonment. *Griffin* was licensed to retail to everybody except minors, intoxicated persons, &c., both by the State and the Federal Government.

Capt. Wilcox answered the complaint of *Griffin* by justify-

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ing his arrest and imprisonment under the order and notice above set out; and the Court held the justification sufficient, and a bar to *Griffin's* suit for damages. *Griffin* appealed to this Court.

Legal authority is a justification to a person in making an arrest. Authority, appearing on its face to be illegal, is not a justification, and will be no protection for making an arrest.

This case, it may be remarked, does not involve the question of the right, in any person, or body of men, to suspend the writ of *habeas corpus*. *Griffin* did not apply for that writ in order to effect his discharge from imprisonment. He submitted to that, and then sued for damages on account of the imprisonment. And, it may be here observed, that the suspension of the writ of *habeas corpus* does not legalize a wrongful arrest and imprisonment; it only deprives the party thus arrested of the means of procuring his liberty, but does not exempt the person making the illegal arrest from liability to damages, in a civil suit, for such arrest, nor from punishment in a criminal prosecution.

Our attention has been called to the following section of the act of Congress of *March 3, 1863*. (Acts of 1863, p. 154.)

"Sec. 4. *And be it further enacted*, That any order of the President, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all Courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment, made, done, or committed, or acts omitted to be done, under and by virtue of such order, or under color of any law of Congress, and such defence may be made by special plea, or under the general issue."

This act was passed to deprive the citizens of all redress for illegal arrests and imprisonments; it was not needed as a protection for making such as are legal, because the common law gives ample protection for making legal arrests and im-

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prisonments. The question here arises, then, can Congress enact that the citizen shall have no redress for a violation of his rights, secured to him by the following provisions of the Constitution of the *United States*, viz: amendments 4 and 5: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated;" "no person shall be deprived of his life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

These sections prohibit the passage of a law by Congress, authorizing the arrest of the citizen, without just cause, because such arrest deprives him of his liberty. They also prohibit the passage of a law depriving him, or authorizing the depriving him of his property, except through a judicial sentence, or upon just compensation. *Taylor v. Porter*, 1 Hill (N. Y.) R. 140; 1 Kent, 10th ed. 623, note; 2 *id.* 430, note. The right to damages, to be recovered in a civil action, for false imprisonment, is a chose in action—is property—and passes to one's representatives at death, by the law of *Indiana*. *Gimbel v. Smidth*, 7 Ind. 527. Hence it is assignable. *Strong v. Clem*, 12 *id.* 37. *Patterson v. Crawford*, *id.* 241, lays down the rule that such a right of action for a tort as would survive, is assignable, but overlooks the fact, decided in *Gimbel v. Smidth*, *supra*, that the right of action for false imprisonment survives.

The above section of the act of Congress can have no greater effect than that of a general pardon; but a pardon reaches the penalty for the crime only, not the civil right of property in damages. *The State v. Farley et al.*, 8 Blackf. 229; Brightley's Dig. p. 7, note. The act of Congress quoted can have no bearing upon this suit.

The real question, lying at the bottom of the case, involves the *war power* of the President of the United States; that is,

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his power to act upon martial law without its having been first declared by the sovereign power of the State—an authority claimed by some to be a “mysterious power, undefined by law, unknown to the subject, which we must not approach without awe, nor speak of without reverence; which no man may question, and to which all men must submit;” but a power which we think exists only within limits capable of being defined with reasonable certainty. The question is one that we would gladly have avoided deciding; but from which, when legally brought before us, we have no right to shrink. It is one, too, the importance of which demands for it a careful examination before it is decided. And it may be further observed, in passing, that when martial law supercedes the civil, or is exercised concurrently with it, the civil being permitted, by mere military sufferance, or as a matter of convenience, where it does not interfere with, or is subservient to, the war power, the military assume the government of the citizens to just the extent they please. The assuming to prohibit the sale of liquor to soldiers in *Indianapolis* was upon this theory. So were the military orders prohibiting the sale of arms and ammunition to citizens in contravention of their constitutional right to procure and keep them. So were the arbitrary arrests for pretended disloyal opinions in violation of the constitutional right of freedom of thought and opinion. These, and other acts in disregard of constitutional and legal rights, all rest upon the same principle. If the military could legally arrest and punish *Griffin* for selling a glass of liquor to a soldier, they could legally arrest and punish him for expressing what they might assume to style a disloyal opinion. If they could not legally punish him for the one, they could not for the other. Could they do either? is the question.

This question we propose fully and fairly to examine, simply for the purpose of ascertaining the law. If we can come to the conclusion that the military possess this power, we will

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promptly concede it to them. We would not rob them of an iota that they possess, and they will not seek an iota that is not theirs. Knowing, as we do, personally, Capt. *Wilcox*, we feel warranted in saying that he has no wish, in the premises, but to legally discharge his duty.

Griffin was not arrested and imprisoned under the civil law of this State, nor of the *United States*, for he had violated no such law. There is no act of Congress, nor of the State Legislature, prohibiting the sale of liquor to an enlisted soldier. The only law in this State, containing such prohibition, when *Griffin* made his sale to a soldier, was that enacted by the military order of Major *Lyon*. *Griffin* was arrested, then, by military authority. Could he be legally arrested, for the cause alleged for his arrest, by that authority, in the place, and at the time it was so made?

Griffin was not connected with the military or public service, was not a spy from the enemy, and was not within military lines. He was a citizen of the State, pursuing, lawfully, his lawful vocation, in the civil walks of life. Had he been a soldier, in the service, he would have been subject to the well defined code of military law, which requires obedience by soldiers to the orders of their officers, and subjects them to punishment, by such officers, in prescribed modes, for disobedience to these orders. In this case, had Major *Lyon* addressed his order to the soldiers subject to his command, forbidding them to drink intoxicating liquor, or to leave the lines to go where it could be obtained, and the soldiers, subject to his jurisdiction, had disobeyed his order, he might, perhaps, though the point is not now before us for decision, have caused them to be punished by military law. Military men, in the service, are subject to the code of military law, enacted for their government, and to be enforced, in prescribed modes, by military officers. So, legislative bodies administer the *lex parliamentaria*—the law governing legislatures. It is

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a special law for such bodies. But, as a general proposition, the citizen, in the civil walks of life, is not subject to military orders, nor to the *lex parlamentaria*, nor to punishment by military or parliamentary law. He is governed by the law of the land, administered in the Courts of justice. He may, sometimes, be subject to martial law, executed by military officers, as the agents of the king, president, or governor, as the case may be. When the citizen is governed by the military power, he is not governed by the soldier's code of military law, but he is said to be governed by martial law; and this law is perfectly distinct and entirely different from military law, to which soldiers are subject. When the military commander, as the agent of the king, president, or governor, governs the citizens, he does not rule them by the code of military law, enacted for the soldiers, as has been said, and for disobedience to which they are punished, but he governs the citizens by arbitrary will. See "Articles of War," for the government of soldiers, enacted by Congress, in Brightley's Dig. 73. We may further illustrate the distinction between governing and punishing those subject to the military code by military tribunals, and governing the citizen by martial law, which is, in fact, no law, but arbitrary will, by extracting a couple of sections from the act of Congress of *March 3, 1863*. Section 30 of that act reads thus:

"That in times of war, insurrection, or rebellion; murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting, or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit a rape, and larceny, shall be punishable by the sentence of a general court martial or military commission, when committed by persons who are in the military service of the *United States*, and subject to the Articles of War; and the punishments for which offences shall never be less than those inflicted by the laws of the

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State, Territory or District in which they may have been committed.”

Section 38, of the same act, is as follows :

“That all persons who, in time of war or of rebellion against the supreme authority of the *United States*, shall be found lurking or acting as spies in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the *United States*, or elsewhere, shall be tried by a general court martial, or military commission, and shall, upon conviction, suffer death.”

Such is military law. What is called martial law, we again repeat, is applied to the citizen, by subjecting him to the government of the military, in certain exigencies. “Martial law is the law of war, that depends on the just but arbitrary power and pleasure of the king, for, though he doth not make any laws but by the common consent in parliament, yet in time of war, by reason of the necessity of it, to guard against dangers that often arise, he useth absolute power; so that his word is law. However opposed to other authorities, this expresses what is distinctly meant, both in *England* and in this country, by martial law.” *New Am. Cyclop. tit. Martial Law*. The question now arises, when and where can the citizen be subjected to this martial law? He can not, certainly, without an act of Congress, be subjected to that law except upon necessity—occasioned by force, actually existing or immediately threatened, at the time and place where martial law is exercised. Whether, by act of Congress, martial law could be declared throughout the *United States*, we need not inquire. See DeHart, *Mil. L.* p. 17.

Martial law is the law of force, and is employed under two general conditions :

1. In a part, or the whole, of a foreign country, when, being at war with such country, our army may invade it, and expel the governing power from a part or the whole of it.

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2. When force may expel the civil authority from a part or the whole of our own territory; or, perhaps, it may be said, martial law is exercised in our country, the military being on the spot to execute it, where no civil authority exists. But where the civil authority exists, the Constitution is imperative that it shall be paramount to the military. The right to govern by martial law does not grow out of the mere fact that we have an army; for we have that at all times, in peace as well as in war. The right to govern *Indianapolis* by martial law does not arise upon the mere fact that soldiers are stationed in the city, or are often marched through it; for soldiers are stationed at different points, and marched from place to place in the country at all times, in peace as well as in war. Yet, in ordinary times, surely the officers commanding them do not claim to govern the citizens, not connected with the army, by martial law.

The right, in the military officer, to govern by martial law, as we have said, arises upon the fact of existing, or immediately impending force, at a given place, and time, against legal authority, which the civil authority is incompetent to overcome; and it is exercised precisely upon the principle on which self-defence justifies the use of force by individuals. Robbers and burglars, and, in some cases, rioters may be resisted and even slain, in self-defence by private individuals. That is, there are cases where force must be resisted by force, instead of waiting for the civil authorities. This is the doctrine of *Rutherford*, in his *Institutes of Natural Law*. See Book 1, chap. 19; Book 2, chap. 9. This is the doctrine expressed by the maxim, "*inter arma silent leges*." This maxim was first applied under such circumstances. It was first laid down by *Cicero*, so far as we have been able to ascertain, in his oration for *Milo*. The facts of that case are thus stated: *Milo* was on his way to *Lanuvium*. *Clodius* met him on the road. *Milo* was in his carriage with his wife, and was accom-

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panied by a numerous retinue, among whom were some gladiators. *Clodius* was on horseback, with about thirty armed men. The followers of each began to fight, and when the tumult had become general, *Clodius* was slain, probably by *Milo* himself. *Milo* was prosecuted for murder. *Cicero* prepared an oration in his defence, in which he asserts that the right of self-defence, when we are attacked by force, is a principle and necessity of nature—that we can not, in such cases, incur the hazard of waiting for the law to protect us—that in such circumstances it may be laid down as a maxim, “*inter arma silent leges*,” that is, that in the midst of actual force, for *arma* is used as meaning force, the law is silent. *Rutherford* uses the word force as signifying arms. He says contention by force, whether by individuals or governments, is war. See *ubi supra*. But because *Milo* had a right to defend himself when and where he was attacked, without invoking law; in short, because the laws were silent for an hour in the midst of the combat between *Milo* and *Clodius*, it was not contended that all law was suspended throughout the Roman Empire during the pleasure of the Executive power.

This corresponds with Lord *Coke's* idea of *Cicero's* maxim. He says:

“When the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma*, then it is said to be time of war.” *Coke* upon *Littleton*, as quoted in *Law. Wheat. Int. Law*, p. 525.

There is another maxim sometime quoted in connection with the above from *Cicero*, which deserves a moment's notice. *Salus populi suprema lex*—the good of the individual

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must yield to that of the public. This maxim, also, is acted upon only locally and temporarily. *Broom* says of it: "Hence there are many cases in which individuals sustain an injury for which the law gives no action; as when private houses are pulled down, or bulwarks raised on private property, for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say, that those who suffer have a right to resort to the public for a satisfaction, but no one ever thought that the common law gave an action against the individual who pulled down the house or raised the bulwark, and the reason is that a man may justify committing the private injury for the public good, as for instance, the pulling down of a house, if necessary, in order to arrest the progress of a fire." *Broom's Maxims*, page 1. See the subject of this maxim well discussed in 2 Kent 333, *et seq.*

These two maxims, and their application, illustrate and define martial law, under absolute governments; and, for the purposes of the case at bar, we shall concede the right to exercise that law, as thus defined and applied under our government, limited, as all its departments are, by a constitution. It is the law of force, applied to govern persons and places where the civil law is expelled; its officers rendered unable to execute it, by forcible resistance. The right, thus temporarily and locally to exercise martial law, in case of necessity, is the war power of the Governor of a State and of the President of the *United States*, and it is all the war power that either possesses by virtue of which he can assume to govern independently of the civil law; and this war power, each executive usually exerts through his subordinate military officers.

This may be further illustrated by examples.

During the administration of Governor *Wright*, as the Executive of this State, it was alleged that a rebellion existed in

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Clay county—that the officers of the civil law were overpowered by force. Governor *Wright*, as commander-in-chief of the military power of the State, sent a military force to the county, the commander of which, as the representative of the Executive, would, if necessary, govern that locality by the war power, till the civil law could resume its sway; but because there was forcible resistance to law in *Clay* county, did that fact authorize Governor *Wright* to overthrow the civil authorities in the whole State, and assume unlimited arbitrary power, to be exercised through military officers?

During the administration of *Washington*, as President of the *United States*, a rebellion occurred in western *Pennsylvania*, on account of the excise law; the civil power was overcome, in that portion of the State. General *Washington* sent thither a military force, and, within the limits of the territory from which the rebels had expelled the civil power, and for just the time necessary to restore the ascendancy of that power, *Washington*, by his Generals, might have found it necessary to govern by the war power. So *Washington* understood this question, and he instructed his officers accordingly. His instructions to them were:

“That every officer and soldier will constantly bear in mind that he comes to support the laws, and that it would be peculiarly unbecoming in him to be, in any way, the infractor of them; that the essential principles of a free government confine the province of the military, when called forth on such occasions, to two objects: first, to combat and subdue all who may be found in arms in opposition to the national will and authority; secondly, to aid and support the civil magistrates in bringing offenders to justice. The dispensation of this justice belongs to the civil magistrates; and let it ever be our pride and our glory to leave the sacred deposite there inviolate.” Irving’s *Life of Washington*, vol. 5, ch. 25.

Rhode Island presents a different example, but strictly with-

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in the same principle; an example where the rebellion was not local, but throughout the entire State, and called into exercise the war power of a Governor of the State. *Rhode Island* is a very small State. Its territory does not exceed that of the three largest counties in *Indiana*. It was governed upon a royal charter granted by *King Charles the Second*, under which only freeholders to a certain amount and their eldest sons were entitled to vote. The people petitioned for a convention to form a new and more democratic constitution. The legislature, year after year, denied the petition. The people finally took the subject into their own hands, called a convention, formed a new constitution, and were proceeding, a great majority of the people engaging in the undertaking, in 1842, to overthrow, entirely to extinguish the old government and put the new one in operation in its place. Force was resorted to on both sides. The contest was not local, but extended to every foot of territory in the State. The legislature of the old government passed an act authorizing the Governor of that government to enforce martial law; he therefore announced it by proclamation, and then exercised it to the extent of forcible resistance to the old government, which was throughout the whole State. *New Am. Cyclop. tit. Dorr; Burke and Causin's Reports to House of Rep., in Congress in 1844; Luther v. Borden, 7 How. (U. S.) Rep. 1.* The charter Governor, *King*, also called on the President of the *United States* for aid to put down the rebellion; the President tendered it, and the people of *Rhode Island* were crushed by military power.

The right, then, of the President to temporarily govern localities, through his military officers, he derives solely from the fact that he is the commander-in-chief of the army, and is to see that the laws are executed; and he can exercise it to just the extent that, and no further than, by the laws of war, a commanding general in the army of the *United States* could

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do it. Where the laws are, or may be, executed without the interference of the President, by his military, he has no right thus to interfere.

The President does not derive his war power from his oath to support, protect and defend the Constitution. That simply obliges him to obey the constitution himself, and to use the power which that instrument confers upon him, and none else, to cause others to obey it. He does not derive his war power from the right to suspend the writ of *habeas corpus*. We do not think he possesses that right under the constitution. We think that is an act of legislative power which can only be performed by Congress; and, even when rightly suspended, it does not justify an exercise of the war power beyond the necessities of the case, but simply takes away the means of obtaining liberty when illegally deprived of it. Simply because the *habeas corpus* is suspended, is it right to destroy every man's liberty and property? The right, in a case of emergency, to exercise the war power, temporarily and locally, supposing that power to exist at all, under the constitution, does not depend upon the fact of the *habeas corpus* being suspended, or not suspended.

And while upon this subject, it may not be improper to observe, that neither the President, nor Congress, has power to suspend the issuing of the writ of *habeas corpus* by a State Court. From this proposition, we take it, no jurist will dissent. Indeed, there is nothing in the act of Congress of March 3d, 1863, cited *supra*, that justifies the inference that Congress assumed to attempt such suspension. The operation of that act must be limited by construction within the constitutional power of Congress.

The provision in the Constitution of the *United States* touching the suspension of the writ of *habeas corpus* by the General Government, is in the 9th section of article 1 of that instrument, and the Supreme Court of the *United States*, in

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Barron v. The Mayor, &c., of Baltimore, 7 Pet. (U. S.) Rep. 243, Chief Justice *Marshall* delivering the opinion, decided that the provisions of that section applied exclusively to the regulation of "the departments of the General Government," and had no application to the departments of the State Governments. We invite special attention to that case; also, to *Smith v. Maryland*, 18 How. U. S. Rep., and cases there cited, and to Sedgwick on Statutes, pp. 596, 612, 616; and Smith on Constitution and Statutes, p. 310.

So, the provisions in the Constitution of the *United States*, providing that property shall not be taken without compensation, and that crimes must be prosecuted by indictment, &c., only apply to the Courts and other departments of the General Government, and have no restraining power upon States, their Legislatures, or Courts. 1 Kent, Lecture 19; 9 Ind. Rep. 558. The suspension of the writ from our State Courts must come from the State Legislature. The statute law of our State requires the Courts to issue the writ; and the Constitution ordains, art. 1, sec. 26, that "the operation of the laws shall never be suspended, except by the authority of the General Assembly." Nor can "the Circuit Courts of the *United States* interfere with the jurisdiction of the Courts of a State." 1 Kent, p. 412. Nor can State Courts interfere with the jurisdiction of the *United States*, or her Courts; and, hence, while the State Courts have the undoubted right to issue writs of *habeas corpus*, in all cases, till a suspension of the right by the State Legislature, they have not a right to deliver persons held in custody by legal authority of the *United States*.

But to prevent such delivery of persons on *habeas corpus*, by a State Court, it must be made to appear to that Court, that the persons are held by authority of the *United States*. For example, a soldier is held under an enlistment by an officer of the *United States*. Is he thus held by authority of the

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United States? If he is eighteen years old, or upwards, he is, because the law of Congress authorizes *United States* officers to enlist and hold such persons. If he is under eighteen, he is not held by the officer under authority of the *United States*, according to the best judgment we can form, because no law of the *United States* authorizes him to enlist and hold such minor. Now, if the petition in such case, presented to a State Judge for a writ of *habeas corpus*, shows that the soldier is over eighteen, the judge should refuse the writ, not because he has not a right to issue writs of *habeas corpus*, but because the petition shows, in the given case, that he has not jurisdiction, the person being held under authority of the *United States*. But if the petition shows that the soldier is under eighteen, the State Judge would have jurisdiction, because no authority has been conferred by the *United States* to hold such persons in custody as soldiers; but the fact that the soldier was eighteen or upwards, might be shown to the Court by the officer, on the return of the writ, and in that event, the jurisdiction of the State Court might cease; and it might become its duty to remand the petitioner. The mode of proceeding in these cases is pointed out in *Ableman v. Booth*, 21 How. (U. S.) Rep. 506. See, also, 20 Ind. 499.

Congress can neither force jurisdiction upon State Courts, nor take it from them. The Courts of *Indiana* do not derive their power to issue writs of *habeas corpus* from the General Government, nor can that Government take it from them. But the State Courts can not extend their writs, when issued, into the domain of the General Government. Prisoners in custody, by authority of the General Government, must go to the Courts of that Government for relief; and if that relief is suspended, they are without relief from the State Courts for want of jurisdiction. The Federal and State Governments are distinct and sovereign within their respective

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spheres, and neither should be permitted to encroach upon the rights of the other.

The war power of the President, then, may be stated thus: He has a right to govern, through his military officers, by martial law, when and where the civil power of the *United States* is suspended by force. In all other times and places, the civil excludes martial law—excludes government by the war power. Where force prevails, martial law may be exercised. But in all parts of the country, where the Courts are open, and the civil power is not expelled by force, the Constitution and laws rule, the President is but President, and no citizen, not connected with the army, can be punished by the military power of the *United States*, nor is he amenable to military orders. See *Skeen v. Monkeimer*, ante, p. 1. If, in such parts of the country, men commit crimes defined by law, they must be punished, according to the Constitution and the law, in the civil Courts. If, in such parts of the country, men have not perpetrated acts constituting, in law, crimes, their arrest, trial, and punishment, by military courts, is but a mode of applying Lynch law; is, in short, mob violence. This is so, unless the old *English* tory doctrine of government is secretly included in our Constitution. That doctrine, as expressed by *Filmer*, is, that “a man is bound to obey the king’s command against law; nay, in some cases, against divine laws.” May’s Const. Hist. vol. 2, p. 21, note. Such was the maxim, the constitution, indeed, of Imperial Rome. “*Quod principi placuit legis habet vigorem.*” What pleases the Prince, has the vigor of law. Coop. Just. Inst. p. 9; 1 Black. Comm. p. 74.

It is not denied that an officer of the navy or army, might plead the order of his government in justification of any act of war he might commit upon a foreign nation; but it will scarcely be seriously contended, we think, by any lawyer, that if the President should order a military officer to seize

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and execute a private citizen of the *United States*, who was quietly pursuing his lawful business, in a State not in rebellion, such officer could justify under the order of the President. If he could, the people are laboring under a delusion as to the force and effect of the Constitution of the Government. But we need not pursue this point, as in the case at bar no order of the President is shown. The command of a Provost Marshal is not necessarily the command of the President. See *Law. Wheat. Int. Law*, p. 189, note; and the great case of *The People v. McLeod*, 1 Hill (N. Y.) Rep. 377, S. C.; 25 Wend. 483.

Having ascertained the principle by which the legality of cases of military arrest and punishment is to be tested, we are now prepared to proceed to the application of the principle to the case at bar.

The existing rebellion in the *United States*, vast as is its extent, is not general, but local. It is confined to the Southern States. It is a sectional rebellion. The theatre of force, where the civil tribunals are closed, is sectional, bounded by geographical lines. It is limited to the slave States. This has been unanimously decided by the Supreme Court of the *United States* in the Prize cases. 2 Black's Rep. p. 685.

There are those by whom it is thought that great provocations have been given to the people of the Northern States, or portions of them, calculated to irritate them into joining in the rebellion; but, under all persecutions and grievances, the people of the Northern States, thanks to their patriotism, have remained true and devoted to the Government of the *United States*.

The rebellion itself did not originate in an attempt, as we have read its history, to overthrow the Government of the *United States*, and is not now ostensibly prosecuted for that purpose. The rebellion consists in an attempt, if we have read aright, to withdraw a certain portion of people and ter-



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ritory from under the jurisdiction of the Government of the *United States*—to divide the Union—leaving the North under the existing Government, and placing the South under a newly created Government. It is true that the rebel armies would, if they could, invade the territory of the Northern States, in order to relieve the rebel States from the desolation of war, without changing the object for which the war is prosecuted on their side, viz: their independence of the Union, or, perhaps, guarantees for rights in it. And, if our army was withdrawn, or greatly weakened before terms of peace were agreed on, the rebels would seize upon their independence, if they did not invade us. Hence, the imperative necessity, imposed on us, of continuing to keep up the army, to prevent this great evil, whatever ultimate purpose the administration may indirectly seek to accomplish by it, which could not be approved.

No one of the Northern States, constituting, as they together do, a decided majority of all the States, desires to overthrow the Constitution of the *United States*, or to withdraw from under its operation; nor do any considerable portion, perhaps not any, of the people of such States, manifest any desire to resist the legal execution of the Constitution and laws. Resistance to illegal arrests and mob violence is not necessarily resistance to the Government. The Courts, in all the Northern States, are and have been open. But the Southern States are attempting, by violence, to sever the Union; and the Government of the *United States*, and the people of the Northern States, are attempting, as they assert, to prevent the severance of the Union of these heretofore *United States*. Such is the object, on both sides, of the war; not to maintain or overthrow the old legal Government of the *United States*, but on one side, to continue the existence of, and on the other to sever, the territorial unity of the nation. And the opposition to the administration, (not the Govern-

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ment,) in the quiet, law-abiding States of the North, is not forcible, but a peaceful difference, and conflict of opinion and argument as to the cause of the rebellion, and the measures which should be pursued as best calculated to restore territorial unity, under the Government of our fathers, with the least destruction of property, the least sacrifice of life and constitutional liberty, and in the shortest possible time. And the question now is, does such peaceful conflict of opinion and argument justify the administration in subjecting those who differ with it to military power? For the case at bar, though perhaps not of that description in its facts, yet rests entirely upon the principle, as we remarked at the outset, of governing by martial law; as it would not be pretended that the military could make such arrest of the citizen as that involved in this case, in time of peace. We have found no legal principle that will justify such a course. We know of no precedent for such an exercise of war power as that above propounded, viz: of subjecting opponents, simply in political opinions, to martial law, for expressing those opinions; for such opinions are not force, nor is the expressing of them force, nor is it a crime by any law of the land.

There is one precedent upon this question to which we think it instructive to refer. When, in 1776, the *American* colonies rebelled against *Great Britain*, not to overthrow the *British* Government—that still stands—but to sever the *British* Union, to take the colonies out from under the jurisdiction of the *British* Government, *King George the Third* determined to go to great lengths in attempting to consolidate *British* public sentiment in support of his particular policy against the colonies. He laid down the two propositions, that the *British* Union should never be dissolved, and that the colonies should be subjugated by the sword to the sovereign will, uninfluenced by any reasonable or fair terms to be offered to invite submission. He went great lengths in attempting to unite the *Eng-*

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lish people at home upon the idea of enforcing his platform by war alone. He used the patronage of the Government, in the shape of contracts and appointments, to corrupt; he spent enormous amounts in actual bribery, and resorted to various means of intimidation to produce a united *English* sentiment corresponding with his own. May's Const. Hist. vol. 1, pp. 80, 48; 2 *id.* 31. On page 52 of vol. 1 are extracts of letters from the King to Lord *North*. On the 4th of *February*, 1779, he wrote: "You may sound Lord *Howe*; but before I name him to preside at the Admiralty Board, I must expect an explicit declaration, that he will zealously concur in prosecuting the war in all quarters of the globe." Again, on the 22d of *June*, 1779, he wrote: "Before I will hear of any man's readiness to come into office, I will expect to see it signed under his own hand and seal, that he has resolved to keep the empire entire, and that no troops shall consequently be drawn from thence, [i. e. *America*,] nor independence ever allowed."

But the King could not produce unity of sentiment in his exclusive war policy. *Chatham*, *Fox*, *Burke*, *Barre*, and other true *Britons*, far-seeing statesmen and illustrious patriots, were for compromise, conciliation, along with war; they warned the King that his policy was less humane, less Christian, than theirs, and was calculated to prolong and increase the expenses of the war; that it involved the overthrow of liberty in *England* itself, and might even subject him, at last, in the dispensations of Providence, to the loss of the brightest jewel of his crown. These sentiments were boldly and earnestly uttered; they were read by the army and the rebel colonists; and, though it was attempted, by a few narrow-minded bigots, to throw distrust upon the patriotism of those great statesman, we have never learned that the King even claimed that their course gave him a right to arrest them by virtue of martial law. See 1 Buckle's Hist. Civ. p. 845. If the

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speakers, thought *King George* and its ministers, advocated erroneous doctrines, the intelligence of the soldiers rendered the army capable of discerning it, and avoiding being influenced by them; or, at all events, the fact did not justify the violation of the constitutional rights of the citizen to suppress them. And the proposition would certainly be a monstrous one, that all utterances of opinion may be prohibited for fear an erroneous one might be expressed; and we have in this country no legal censor, outside of the law, who has a right to set up his own opinions as a test by which the correctness of all others is to be determined. The foregoing is the precedent from *Great Britain*. We should be reluctant to seek others in *Spain, Austria, Russia, Turkey, Naples, Mexico*, or the so-called Confederate States.

We feel constrained, then, to come to the conclusion, that the war power of the President is limited to the simple right of exercising martial law, simply as a military chief, locally and temporarily, where actual or immediately impending force renders it a military necessity. No other doctrine can be reconciled with the Constitution of the *United States*, or is compatible with the liberties of the people.

The next question that arises is, how is the existence of the fact that the civil power is superseded by illegal, forcible resistance, to be ascertained? Is it a fact to be proved on the trial, or decided by the Court upon judicial knowledge? If the former, there is no averment in the answer of the existence of such fact, and it was bad for that reason. If the latter, we are able to state, with a feeling of complete assurance, that there has at no time been any forcible resistance, on the part of the people, to the civil power, in the city of *Indianapolis*, which the officers of the law were not easily able to overcome, when disposed to do their duty. The Courts have at all times been open, and there are a sufficiency of them here, including those of the city, State, and *United States*, to

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meet the public necessities. And, extending our observation from the city to all parts of our Commonwealth, we are proud and happy in being able to say, in honor of the people and State of *Indiana*, that all the citizens of the State, with scarcely an exception, if indeed there is one, are, and always have been, eminently true and patriotic, and remarkably patient. Judge *Leavitt*, in the *Vallandigham* case, we regret to say, assuming to speak by judicial knowledge, but beyond question upon false and slanderous information, of the people of this State, charges that a portion of them are affected with the rankest disloyalty. Our judicial knowledge is thorough to the contrary. The people of *Indiana* are all for the Constitution, the Union as formed by it, and the laws enacted pursuant to it. No one is opposed to the Government, (using that word in the proper sense, and not as meaning the administration,) but only where opposition is expressed to any proceeding, to acts believed to be illegal and tyrannical, as perpetrated by individuals. The people of the State, in the language of an illustrious statesman now no more, are for Liberty and Union, one and inseparable, now and forever. They are, as we said above, and again repeat, devoted to the Constitution, the Union, and the laws, and with one accord, unite in the invocation—*Sunto perpetuæ*.

The following opinion was delivered in the same case by—

HANNA, J.—In the conclusion upon the legal points necessary to be decided in the case at bar, I fully concur; nevertheless certain propositions are advanced in the opinion, by way of argument, which I think are unnecessary and illogical, and, with that part of the argument, I do not agree, and desire to so say, although what I may say can not be strictly called a dissent. There are also some additional and somewhat different reasons which have presented themselves to

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my mind, which I desire to offer, to sustain the conclusion of the Court. The theory upon which the conclusion arrived at is based, and very justly too, is that certain reserved and constitutional rights of a private citizen—the appellant—had been wrongfully wrested from him by the defendant, in the capacity of a military officer, in the face of the Declaration of Independence, and notwithstanding the express guarantees of the constitutions of the *United States* and of this State. The former is the foundation stone upon which the structure of our government is reared. It declares in emphatic language that men are “endowed by their creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.” The constitution of the *United States* was framed to secure these, and provides that the “trial of all crimes, except in cases of impeachment, shall be by jury; sec. 2, art. 3; and the person of the citizen shall be secure from unreasonable seizures.” 4 Amendment. The sixth amendment reiterates the right of one accused to a speedy trial by a jury. The constitution of the State also guarantees these rights; art. 1, secs. 11, 13 and 19; and in express terms declares that the “military shall be kept in strict subordination to the civil power.” Art. 1, sec. 33.

In open disregard of all these guarantees, the appellant was seized without a legal warrant and punished, by imprisonment, without a trial. This punishment was inflicted under the semblance of military authority. The opinion, as prepared by Judge *Perkins*, is clear and satisfactory to my mind that, no legitimate authority was, under the circumstances, possessed by those who attempted thus to exercise it. If in this we are mistaken, then it follows that in this portion of the country, where no war, insurrection or rebellion exists, the will of a military officer becomes the law; yea, the su-

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preme law, by which men may be deprived of property, their liberty, and even their lives; whereas, it is provided that the constitution, and laws passed in pursuance thereof, shall be the rule to regulate men's actions. Art. 6. I am aware it has become very fashionable for men, who have bestowed but little thought upon this subject, or who are blinded by fanaticism, to express a willingness to set at nought the constitution and the laws, if, in their opinion, they stand in the way of the adoption of favorite measures to suppress the rebellion. Believing that a strict adherence to the constitution and the proper enforcement of the laws made in pursuance thereof, would greatly aid in the exercise of the just and sufficient powers of the government, which is the very best ever invented by the wisdom of man, I avail myself of this opportunity to put upon the record my protest against such dangerous doctrines, full of heresies towards a republican form of government, tending to consolidation, the ultimate erection of a monarchy, or military dynasty, which history informs us is always a despotism.

It will be observed that the judgment in this Court, in the case at bar, is based upon the theory of the unjust exercise of force by the military authority, and in the opinion many other instances of a like character are referred to. The opinion then seems to assume, and it appears to me to step aside to assume, that to prevent territorial separation, we concede the necessity of keeping up the army, to whatever improper use it may be put by the administration. This savors more of a political than of a legal proposition, and is, in my view the illogical part of the argument, is wide of the legal conclusion arrived at, and is, in effect, saying that to part with a portion of territory is the worst evil that can befall us. Whilst, as a question of policy, all men are equally, perhaps, opposed to any division of territory, or separation of States, yet some honestly believe there are greater evils. The frame work of

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our government has not been legally changed since it was first framed as the rule of action to govern some four millions of people, in thirteen States. It was yet the same at the commencement of this rebellion, when it included within its ample folds thirty millions of people in thirty-four States. It was equally adapted to the larger as well as to the smaller space. It is in point of fact and of law but the same government to-day that it was before the war—so far as States where no war exists are interested, for the people, who are by the theory of the government the source of all power, have not changed that form of government. Whether those who are, for the time being, administering the government, have been guilty of the exercise of powers not granted by the constitution, is quite another question. The government, as we have seen, was inaugurated to secure to each citizen certain unalienable rights—rights which have not been alienated, or transferred, to Congress, nor to the President, nor to the military commanders; for they could not be so conveyed and the people remain free, and when wrested from them by force they will become mere serfs. If those sacred rights, among which are the liberty of speech, the liberty of the press, and the freedom of elections, which are the three great bulwarks of free institutions, are to be stricken down, permanently destroyed by armed force; or, if that force is not to be used to restore the just authority of our once glorious government, but merely to establish, by wading through seas of blood, a single consolidated government, having for its corner stone certain chimerical ideas of philanthropy, fraternity and equality, social and political, of all races of men, without respect to color, then it might not be so readily conceded that imperative necessity would require that the force should be kept up solely for such purpose.

As to the act of Congress, set forth in the opinion, and upon which the decision of the lower Court is attempted to

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be justified, it is necessary, perhaps, for a moment, to advert to the circumstances surrounding those who framed the constitution of the *United States*, to fully appreciate the provisions of that instrument, quoted as bearing upon said act. Previous to the revolution, the laws, usages and customs prevailing were, to a great extent, those of the mother country, for the colonies were subject to her control. History shows that in that mother country, instances had occurred of the assumption of unwarranted power, and the exercise of oppressive acts, by those administering the government, and that to shield themselves from the legal effect of their unjust acts, the oppressors, ministers in power, had procured acts of Parliament exonerating them from liability to the outraged laws and injured citizens.

In *England* such statutes might be held valid, because they have no written constitution, and in their theory of government the Parliament is omnipotent; it has caused Princes to be crowned and Kings to be beheaded; it is supposed to be the voice of the governing power. In this country the people have said, in effect, by a written constitution, *this* power we give to the President, *this* to the Congress, and *this* to the federal judiciary. They wrote down the grant of power to each department. Beyond the passage of laws necessary to carry out those powers, Congress can not rightfully go. All other powers not thus delegated to either or all of those three departments, nor prohibited to the States, are reserved to the States respectively, or to the people. See 10 amendment. Not content with this definite grant of powers, and positive reservation of all other powers not so granted, certain stringent prohibitions and restrictions upon the action of the federal government and its departments were inserted. The very first line of the guarantees is that "Congress shall make no law," &c., &c. See 1 Amend. Const. U. S. Then follows, as I understand that instrument, the enumeration of

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various subjects upon which the Congress shall make no law infringing the rights of the people. Among those rights are life, liberty, and the right to possess and enjoy property, of which the citizen can not be deprived without due process of law; 5 amendment; and also to be secure from arrests, &c. 4 amendment. Now, it will be observed that in *England*, by the common law, the individual was, to a certain extent, protected in his person and his property. Yet that protection had been repeatedly disregarded by those in power, and the perpetrators of the wrong shielded by acts of Parliament, as before stated. Therefore to prevent such an unjust course of procedure, the constitution thus expressly sets up a barrier against the passage of a law by Congress authorizing the perpetration of such acts of wantonness by those in authority. Then the simple question is, if the Congress can rightfully pass no law authorizing the perpetration of wrongful acts, as to these reserved rights of the citizen, can it, after they have been committed, shield the offender by saying he shall not be responsible in damages to the sufferer. There is no question as to the pardoning power involved, for Congress possesses no such power. That power is lodged in the President and relates only to "offences against the *United States*," not to damages to one individual by the unlawful and injurious act of another. Art. 2, sec. 2, Conat. U. S.

For these reasons, and those of a legal character given in the opinion of the Court, the judgment ought to be reversed.

Per Curiam.—The judgment is reversed, with costs. Cause remanded.

John L. Ketcham, for the appellant.

E. A. Davis and *T. W. Bowles*, for the appellee.

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145	69
21	398
149	161
21	398
156	88

HUSBAND AND WIFE—MARRIED WOMEN.—A relinquishment of her contingent interest in her husband's real estate, by the wife, her husband being alive, is a valuable and sufficient consideration for a conveyance by her husband, or procured by him, to her, of property which may be considered but a fair equivalent for such interest; and such conveyance will be deemed valid or invalid as it may be shown to be fair or fraudulent, and the comparative value of the respective estates may be taken into consideration.

WITNESS—HUSBAND AND WIFE.—Where the husband and wife are both parties to an action, but the subject matter in controversy is claimed by the wife, and, under the issues in the cause, the husband discloses no such interest as would render him a competent witness in his own behalf, his testimony ought not to be admitted.

PRACTICE IN SUPREME COURT.—Improper evidence, if allowed to be given and not objected to below, will not be available to reverse the judgment, in this Court.

APPEAL from the *Franklin* Circuit Court.

HANNA, J.—A suit was instituted by the State, on relation of the Auditor, against *Larue* and wife, mortgagors of certain property to a trust fund. Junior incumbrancers were made defendants, to-wit: *Hollowell, Haines, and Roberts*, each of whom had judgments rendered in 1858 and 1859, against one *M. V. Simonson*, in whose wife, *Catharine*, the title, by deed dated in 1852, appeared to rest, as the remote grantee of said *Larue*.

There was no controversy about the right of the plaintiff to recover; nor is there any question made here in that behalf.

The question is, who shall have the overplus after the payment of the said mortgage debt?

Mrs. Simonson pleaded that, previous to the purchase of said property, her husband had sold real estate of the value

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of 3,000 dollars, which had been accumulated by their joint labor for 25 years; that she refused to join in the deeds thereto unless this property should be purchased for her, and in her name; that it was agreed that it should be so purchased, at the sum of 1,200 dollars, subject to this mortgage for 300 dollars; that her husband was then, and for several years afterwards, solvent, having property, other than this, more than sufficient to pay all his debts, to-wit: to the value of 2,000 dollars; that she purchased said property with funds which she claimed to be her own; that she denied the land, &c., ever did belong to her husband; that the debts set up in the answer of *Hollowell*, *Haines*, and *Roberts*, were not in existence at the time she made said purchase, but were created afterwards, &c.; that she would not have released her interest in the lands sold by her husband, but for the agreement made in good faith, that this property should be hers, &c.

This answer was filed in response to the pleadings of said *Hollowell* and *Haines*, in which they had set up the judgments obtained by them and *Roberts*, and charged that the indebtedness to *Hollowell*, of some 800 dollars, and to *Roberts* of 1,200 had accrued before the deed was taken by *Mrs. Simonson*, and that the same was, by the said *M. V. Simonson*, fraudulently procured, and so taken by the grantee, in fraud of their rights, &c.

There was a demurrer overruled to the answer of *Mrs. Simonson*, which presents the first point in the case. Somewhat similar questions are also involved in instructions given and refused, namely, whether, as against existing creditors, a valid agreement can be made by a solvent husband and his wife as to a provision for the latter out of the property accumulated, as in said answer set up, and upon the consideration stated therein.

We have no doubt the answer of *Mrs. Simonson* presented a good defence, but as it contains allegations not supported

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by the proof, nor alluded to in the instructions—namely, that the purchase was made with her property, and at a time when her husband was not in debt, we will pass it, and consider the questions involved in the instructions, in view of the evidence before the Court.

The evidence showed that, at the date of the deed to *Mrs. Simonson*, her husband was bound as a surety for the debt to *Hollowell*, then of some 600 dollars; and tends to show that he also was responsible for some 1200 or 1400 dollars more, which he had received for another person. The evidence, aside from that of *Simonson*, pretty clearly shows that, he was then worth, including the amount paid for this land, some 5,000 or 6,000 dollars, and, if his evidence is considered, some 10,000 dollars.

We understand it to be well settled, upon ample authority, that a relinquishment of dower by the wife, the husband being then alive, is a good and valuable consideration for a conveyance by the husband, or procured by him, to the wife, of property which may be considered but a fair equivalent; and that the same will be viewed as valid or not, as it may be shown to be fair or fraudulent, and the comparative value of the respective estates and interests may be taken into consideration. *Levinz* 146; *McCann v. Letcher*, 8 B. Mon. 326; *Ward v. Shallet*, 2 Vesey sen. 16; *Atherly* on marriage settlements 162. This proposition is founded upon the principle that, whatever is taken from the funds of the husband, whereby he might discharge his debts, is replaced by an equivalent from the funds of the wife, which his creditors could not otherwise reach. *Hunt v. Depruy*, 11 B. Mon. 286; *Marshall v. McDaniel*, 8 *id.* 175; 5 *id.* 305; *Bullard v. Briggs*, 7 Pickering 533. As dower interest was a right which a husband could not convey, so as to defeat it, it belonged not to him but to the wife, and her title was paramount to that of the husband, and it necessarily followed, it could not be

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taken for his debts without her consent. *Adset v. Adset*, 2 J. C. Rep. 457.

From these propositions and principles, the conclusion might well follow, that if the transaction was fair and the consideration received but an equivalent for the interest or estate granted, it might be supported notwithstanding the fact, that the husband's debts at the time were more than equal to the amount of his property. Of course this might involve inquiry as to the value of her interest conveyed, as compared with the consideration received by her. This comparative value is inquired into for the purpose of determining the honesty of the transaction. As a matter of course, this class of evidence is not of so great value or importance in a case where, after thus providing for the wife, the means in the hands of the husband are much greater than the debts he may owe, or when he owes nothing, if the transaction is not tainted with fraud. That she should obtain a fee simple for a contingent life estate, would not matter, except as determining the character of the transaction as above indicated.

There is a bill of exceptions in the case which professes to embody all the evidence. It is apparently contradictory in its statements, in this, that in the first part of the bill, it shows that said defendants *Simonson* and wife "offered the defendant, *M. V. Simonson*, as a witness, who was examined as a witness for the defendant, *Catharine*." The evidence of said *Simonson* is not set forth in that part of said record, but some 70 pages further forward in the record appears this entry: "*M. V. Simonson* examined, (for himself.)" His testimony then follows, and related alone to his pecuniary condition before, at the date of, and after the date of, the deed to his wife for the property in controversy.

The questions on this are, first, whether he was a witness in his own behalf, or his wife's? Secondly, whether a hus-

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band could thus testify generally in his own behalf, but, as in the case at bar, incidentally to the benefit of his wife?

As it is stated that the record contains all the evidence, we cannot presume that *Simonson* gave any testimony in behalf of his wife, at the time the Court authorized an examination to elicit such evidence from him. The order of the Court therefore, in that respect, however erroneous, appears to have been harmless.

M. V. Simonson answered the pleading of *Hollowell* and *Haines* by a denial.

It does not appear in the record, that the introduction of the evidence of said *Simonson*, in his own behalf, was objected to. But it is said there was no issue between him and his said co-defendants to which his evidence could be directed.

The pleadings stood thus:

First, a complaint against *Larue* and wife, as mortgagors, *Miller* as grantee of *Larue*, and *Mrs. Simonson* as grantee of *Miller*, and charging that *Mr. Simonson* bought and paid for the property, and procured the deed to be made to his wife, against *Hollowell*, *Haines*, and *Roberts*, each as incumbrancers by judgments younger than the mortgage.

To this there was a general denial by *Larue*, *Miller*, and *Roberts*. *Hollowell* and *Haines* each answered, charging the purchase by *Simonson* of said property, and that he had fraudulently caused it to be conveyed to *Mrs. Simonson*, &c. *Simonson* did not answer the complaint, but denied the answer of said *Hollowell* and *Haines* as before stated. *Mrs. Simonson* answered as before stated. *Hollowell* and *Haines* in reply denied the answer of *Mrs. Simonson*, and also replied affirming the indebtedness of *Mr. Simonson* at the date of said deed, and that it was made to defraud his creditors. Under these pleadings, was there any issue to be tried, in which *Simonson* had such interest to be protected, as would authorize his introduction as a witness? and if not, what was

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the effect of his introduction, without objection, and the evidence he gave?

We cannot perceive that *Simonson* had such an interest, under these issues, as would permit him to be a witness. This being the case, it follows that his evidence was directed wholly to the issues being tried between *Hollowell* and *Haines*, and *Mrs. Simonson*. The question is not, therefore, presented by this record as to his right to testify in his own behalf, although such testimony should incidentally bear upon the issues made by his wife. As the testimony of said witness was irrelevant to any issue to which he was a party, and was applicable only to the issues to which his wife was a party, he was, as to such evidence, incompetent. But as the evidence thus given, ostensibly in his own behalf, but really in the interest of his wife, does not appear to have been objected to, the question is, what was the effect thereof?

It has been often held that, although evidence may have been given that, if objected to, would have been excluded; yet having been admitted without objection, it can not be made available on appeal to reverse the judgment.

The further question was, presented in the proceedings, whether said *Hollowell* could show other transactions, after the date of said deed, in which said *Simonson* loaned money, and took notes payable to his wife, for the purpose of defrauding his creditors, upon the trial of the issues, as to the validity of said deed.

This suit was instituted in 1862, and tried in 1863. Ten years had elapsed after the transaction, which was sought to be set aside as fraudulent. The offer to make the proof, above indicated, did not show to the Court the time the money should have been loaned, &c., but stated that it was "after the voluntary conveyance;" it might have been immediately preceding the trial. At such a length of time, we can not see that any connection between the two acts could

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be presumed, so that the first should be considered void, even if the second was invalid or fraudulent.

We must presume in favor of the ruling of the Court. If such proof had been permitted, and had shown a loan, &c., several years after the making of the deed, it would have been irrelevant, unless the connection had been also shown, directly or circumstantially, between the two transactions.

Per Curiam.—The judgment is affirmed, with costs.

Wilson Morrow, for the appellants.

Nelson B. Rariden, Geo. Holland and C. C. Binkleg, for the appellees.

STANDEFORD *et al.* v. DEVOL *et al.*

HUSBAND AND WIFE—MARRIED WOMEN.—In 1843, *A* contracted with *B*, the wife of *C*, and *D*, the daughter of *C*, for the sale to them of certain land, for 1,000 dollars, one-half whereof was paid at the date of contract, and a title bond executed by *A* for the conveyance of the land to *D*, and *B* and *D* executed their promissory note to *A*, at twelve months, for the other half of the purchase money, which was paid at maturity, and then said bond was canceled, and, under another arrangement, *A* conveyed said land to *E*, a son-in-law of *B* and *C*. The first payment on the land was made in part by the transfer of a note to *A*, which *B* held in her own right, *C* having nothing to do with the transfer, and all of the residue of the purchase money was paid by *B*, with her own money, received from the estate of her grandfather. Said money was received by her after her marriage with *C*, but never came into his possession, and was never claimed by him by virtue of his marital rights, or otherwise. Said money did not come to her with any limitation to her separate use. *B* and *C* and their family together

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occupied and used said land. Action to subject said land to payment of *C's* debts.

Held, that the money with which said land was purchased never became the property of *C*, the husband, and that the land therefore could not be subjected to the payment of *C's* debts.

Held, also, that, prior to the laws of this State enlarging the rights of married women, the personal property of the wife, which came to her after the marriage, did not become the property of the husband, *ipso facto*, but only when it had been actually reduced to possession by him, by such acts as evinced an intention to divest his wife's right or title, and make it absolutely his own.

This case is distinguished from *Miller v. Blackburn*, 14 Ind. 62.

APPEAL from the *Putnam* Circuit Court.

WORDEN, J.—This was an action by the appellees against the appellants, the object of which was to reach certain lands in the hands of *Joseph Standeford*, and apply the proceeds to the payment of certain judgments held by the plaintiffs against *John Standeford*, on the ground that the money of said *John* had been invested in the purchase of said lands. Trial, verdict and judgment for the plaintiffs.

The following is the case made by the evidence: The plaintiffs are the judgment creditors of *John Standeford*, who is insolvent. About the year 1843 one *Josiah Harding* made a contract with *Hannah Standeford*, wife of said *John*, and *Sarah*, their daughter, who was then about 18 years of age, for the sale to them of the land in question, at the price of 1,000 dollars, one half of which was paid down, and a title bond executed for the conveyance of the land to said *Sarah*. *Mrs. Standeford* and *Sarah* executed their promissory note for the residue of the purchase money, payable in twelve months. The residue of the purchase money being afterwards paid, the title bond was surrendered, and, by an arrangement of the parties, a conveyance was executed to one *William L. Mahan*, a son-in-law of *Mr.* and *Mrs. Standeford*.

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Such further conveyances were finally made as vested the title in *Joseph Standeford*, who is a son of *Mr. and Mrs. Standeford*. *Joseph*, it may be observed, is not in a position to hold the land free from the claims of the plaintiffs, if the money invested therein be deemed to have been the money of *John Standeford*, his father. The first payment on the land was made in part by the transfer of a promissory note to *Harding*, which *Mrs. Standeford* held in her own right. Her husband had nothing to do with the transfer. Except the note above mentioned, *Mrs. Standeford* paid for the land with her own money, which she received from the estate of her grandfather. This money was received by her long after her intermarriage with *Standeford*, and never went into his possession, nor did he ever receive or claim it, by virtue of his marital rights, or otherwise. He never paid anything on the land, nor had he anything to do with the contract of purchase. The money thus received by *Mrs. Standeford* and paid for the land did not come to her with any kind of limitation to her separate use. *Standeford* and his family have had the use and occupation of the land since it was thus purchased.

The above are believed to be all the material facts in the case, as condensed from the testimony of the witnesses. It is not a case of conflict of evidence, and the question arises, whether, on the foregoing facts, the plaintiffs were entitled to recover.

Was the money thus invested in the land, in legal contemplation, the money of the husband, in such sense as to enable his creditors to pursue it? The case must be decided upon the law as it stood before our recent statutes enlarging the rights of married women. Had the money in question been in the hands of *Mrs. Standeford* at the time of the marriage, the case would have been covered by what was said in the case of *Miller v. Blackburn*, 14 Ind. 62, in overruling the petition for rehearing. On page 82, the following language is

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employed: "The money invested in the land, not being the separate property of the wife, became, in my opinion, the property of the husband by virtue of the marriage. It was not a mere chose in action, which, in order to make it the property of the husband, required a reduction to his actual possession. Money in the hands of a guardian is deemed, in law, to be in the possession of the ward, and that possession of the ward became the possession of her husband upon her marriage." The case goes upon the theory that the money was in the possession of the wife, (the possession of her guardian being her possession,) at the time of the marriage. If we were right in assuming that the possession of the guardian was the possession of the ward, the doctrine stated is sustained by the authorities. Says *Mr. Kent*, (2 Com. 10 ed. p. 135.): "As to personal property of the wife, which she had in possession at the time of the marriage, in her own right, and not *en autre droit*, such as money, goods and chattels, and moveables, they vest immediately and absolutely in the husband, and he can dispose of them as he pleases, and on his death they go to his representatives, as being entirely his property."

But the case before us is an entirely different one. Here the claim due to *Mrs. Standeford*, before it was paid to her, was, at most, but a chose in action; and the husband was not the owner until he had reduced it to his possession, which he never did. "Marriage is only a qualified gift to the husband of his wife's choses in action, viz: that he reduce them into possession during its continuance," &c. 1 Bright's Hus. and Wife 36; 1 Kent Com. 122. Says *Mr. Bright*, p. 48: "A mere intention to reduce the wife's choses in action into possession will be insufficient. The acts to effect that purposes must be such as to change the property in them, or, in other words, must be something to divest the wife's right, and to make that of the husband absolute." Indeed, the husband may

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take possession of his wife's choses in action, without making them his own. "If he take possession, in the character of trustee and not of husband, it is not such a possession as will bar the right of the wife, if she survive him. The property must come under the actual control and possession of the husband, *quasi* husband, or the wife will take as survivor, instead of the personal representatives of the husband." 2 Kent Com. 127.

In Hill on Trustees, 3 Am. ed., page 621, note, it is said: "What will constitute actual reduction to possession is not susceptible of exact definition, but depends on intention. There must be some distinct act evincing a determination to take as husband."

These are elementary principles, and applied to the case before us, show that the money invested in the land by the wife, was not the money of the husband. He not only never had the possession of the money, but he did no act whatever evincing an intention to claim it or make it his by virtue of his marital rights. On the contrary, he left it in the possession and entirely under the control and dominion of his wife, and suffered her to invest it as above stated, thereby showing that he did not intend to claim it or make it his own. Indeed, there is no ground to claim that the money was that of the husband, unless it be upon the ground that the receipt of the money by the wife during the coverture made it *ipso facto* the money of the husband. But there is this difference between things in action and in possession. It is undoubtedly true, as was held in the case of *Miller v. Blackburn*, *supra*, that money or other personalty in the possession of the wife, in her own right, at the time of the marriage, vests absolutely in the husband, without any further act on his part to make it such. But where there is a chose in action due to the wife at the time of the marriage, or accruing to her during the coverture, he, in order to make it his, must do some act evincing

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an intention to make it his own; in the language of the books, his acts must be such as to change the property and divest his wife's right.

But this doctrine does not rest upon the elementary books alone; the adjudicated cases fully sustain the proposition that, in the case before us, there was no such reduction of the money to the possession of the husband as to make it his. Some of these cases will be adverted to.

The case of *Totten v. McManus*, 5 Ind. 407, was a bill filed by a creditor of *McManus* to reach certain lands purchased by his wife after coverture, with means which she had before marriage, but which she reduced to cash after marriage. It was claimed that the money, the moment it came into the hands of the wife, became the property of the husband. It was held otherwise by the Court.

This case is less satisfactory than it would have been had it appeared clearly, whether the property which the wife thus turned into cash was limited to her separate use. The case goes on the theory that the property was the wife's separate property, and is, therefore, perhaps not strictly in point here. But in *Miller v. Blackburn*, *supra*, it was said by *Perkins, J.*, in speaking of the case of *Totten v. McManus*: "There the husband did not reduce the property of the wife to possession. He permitted her to retain and vest it in real estate in her own name. When that was done it was placed beyond his reach, without the aid of a court of chancery. It remained the wife's property unreduced."

In the case of *Gochenous' estate*, 23 Penn. 460, the Court, after quoting the passage from *Kent* to the effect that the property must come under the control and possession of the husband, as husband, proceeds as follows: "This distinction has been fully adopted in *Pennsylvania*, and a series of well considered cases, carrying out the principle to its logical result, has established that reduction into possession, so as to

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work a change of ownership, is a question of intention to be inquired of upon all the circumstances. Conversion is not reduction into possession, but only evidence of it, and therefore conversion may be explained by other evidence, negating the intention to reduce to possession in such a manner as to transfer the title. According to these cases marriage is treated as only a conditional gift of his wife's choses in action, or, to speak more accurately, a gift to the husband of her power to dispose of them to himself or any one else, by force of the dominion to which he has succeeded, as the representative of her person; and because the gift is conditional, he has a right to reject it by refusing to perform the condition. The law does not cast it upon him beyond his power of resistance; for every gift requires the assent of the donee, and hence clear proof that the husband received the wife's money as a loan, or a disclaimer of intention to make it his own property, proved by his admissions, will preserve her right of survivorship."

The case of *Timbers v. Katz*, 6 Watts and Serg. 290, was much like the present in many of its features. There, a married woman had a sum of money due to her on a bond. The money was paid to her by the obligor, and, upon payment, she and her husband executed a receipt to the obligor for the payment. She afterwards invested the money in land in the name of her daughter. It was held, *Gibson*, C. J., delivering the opinion of the Court, that the transaction was not only not fraudulent, but that the money was not the money of the husband, it not having been reduced to his possession, and that the creditors of the husband could not pursue it into the land. This is a very well considered case, in which the law is clearly stated, and is strictly in point with the one before us.

We have only to observe, further, that there is no ground whatever on which to claim that the note transferred by *Mrs.*

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Standeford in part payment of the land, had been made the property of her husband by any act of his whatever.

We are of opinion that on the case made by the evidence, the plaintiffs were not entitled to recover, and hence, that a motion for a new trial, which was made, should have prevailed.

Per Curiam.—The judgment below is reversed with costs, and the cause remanded.

McDonald & Porter, and *Williamson & Daggy*, for the appellants.

McDonald & Roache, and *John Hanna*, for the appellees.

BELL v. CAFFERTY.

PROMISSORY NOTES—WARRANTY.—The person who sells promissory notes, whether by endorsement or delivery without endorsement, warrants them to be genuine and not forgeries.

CONTRACTS—SALE—FRAUD.—Where a person sells personal property, and the vendee pays therefor by transferring to the vendor forged promissory notes, knowing them to be forged, such sale will not be rendered absolutely void by such fraud, but only voidable.

CONTRACTS—RESCISION OF.—In such case, whether the fraud amount to a crime or not, the vendor, being himself innocent, still has the right to avoid or affirm the sale, upon the discovery of the fraud, so long as the property remains in the possession of the vendee, or a purchaser from him with notice.

SAME—SALE.—But, where there has been a sale, and delivery under it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor.

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APPEAL from the *Miami* Circuit Court.

WORDEN, J.—Replevin by *Cafferty* against *Bell* for a mare. The cause was submitted to the Court on an agreed statement of facts, upon which statement the Court found for the plaintiff, and rendered judgment accordingly.

The defendant, having taken the proper steps to present the question involved, appeals. The following are the facts as agreed upon :

“Before and on the 17th day of *August*, 1863, the plaintiff was the owner of, and in possession of the mare in controversy; that on said day one ——— *Stewart*, who professed to be an agent for an *Illinois* insurance company, came to the plaintiff and proposed to purchase the mare in controversy, and offered him in payment four several promissory notes, amounting in the aggregate to 90 dollars, which notes were on responsible men, living within a few miles of the plaintiff, in *Cass* county, *Indiana*, whom the plaintiff personally knew, and which notes are not yet due; that the plaintiff in good faith, and believing said notes to be good and genuine, accepted said offer, which said notes said *Stewart* represented as good and genuine, sold said mare to said *Stewart* and took said notes in payment, and delivered said mare to said *Stewart*, intending thereby to part with the ownership thereof. *Stewart* took the mare, on the evening of the same day, to *Peru*, 18 miles distant from the place of purchase, and on the next day, in the streets of said town of *Peru*, after offering her for sale to divers persons, sold her to the defendant, *Bell*, who was ignorant of any fraud practiced on plaintiff by *Stewart*, for 60 dollars in cash, and who purchased and paid for said mare in good faith, believing he was getting a good title to her, and without notice of any fraud, or of any defect in *Stewart's* title; that *Stewart* gave as a reason why he wished to sell the mare, that he resided in *Elkhart*, and that he was sick and unable to ride her to that place, and that if he could

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sell her he would take the cars for home; that *Stewart* left on the first train after the sale, and has not since been heard from; That said plaintiff received said notes in payment for said mare, on *Monday*, and on the following *Thursday*, for the first time, called upon the payers of said notes, when he learned that they were forged and of no value whatever; that he came to *Peru*, found the mare in the possession of the defendant, and demanded her of him before the commencement of this suit; that she is in the possession of the plaintiff at this time, having been delivered to him under the writ of replevin, &c., and that she is of the value of 80 dollars. It is further agreed that the notes are forgeries and of no value; that the plaintiff never saw *Stewart* after the sale of the mare to him, and that the defendant, *Bell*, purchased her from *Stewart* in good faith, for a valuable consideration, and without notice of the fraud."

In our opinion, the finding and judgment of the Court below, should have been for the defendant instead of the plaintiff. The ground of this opinion will be stated.

It may be observed, as a preliminary remark, that it does not appear from the agreement whether *Stewart* was a party to the notes which he transferred to the defendant, and whether he indorsed them; or whether he transferred them by delivery merely. But whether he indorsed them, or transferred them by delivery merely, he warranted them to be genuine, and not forgeries. 2 Parsons on notes and bills, pp. 588, 589, 600. It may also be further remarked, that it does not appear, (unless it be by inference,) that *Stewart* knew that the notes were forgeries. But for the purpose of putting the case in the strongest light for the plaintiff below, we will assume that he did. It may be that, if *Stewart* was ignorant that the notes were forged, the contract of sale would have been voidable by the plaintiff, on the ground of a total failure of the consideration therefor; but on that supposition, the

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proposition that the sale, if voidable, was not absolutely void, and that the plaintiff might have affirmed it, and sued *Stewart* for the price of the mare, or the amount of the notes, is so clear that we shall not further discuss it. *Sharp v. Jones*, 18 Ind. 314.

If *Stewart* knew that the notes were forged, it is very clear that the fraud practiced by him in transferring them to the plaintiff in payment for the mare, rendered the contract of sale voidable, if not absolutely void. But we are of opinion that the fraud only rendered the contract voidable, and not void.

The plaintiff might, notwithstanding the forgery, have affirmed the sale, and sued *Stewart* for the purchase money. It was at his option either to avoid, or to affirm the contract of sale. Suppose *Stewart* had paid for the mare in counterfeit bank notes, knowing them to have been counterfeit, it cannot be doubted that the plaintiff might have affirmed the sale, and sued him for the price of the mare. The fact that the mare was paid for in forged notes against individuals, does not seem to vary the case. "If a party," says *Mr. Parsons*, "who gives a bill, knows at the time that it is of no value, the holder may, when he discovers the fraud, sue the party on his original liability; or if the bill be given for goods, the sale being tainted with fraud, on the part of the vendee, the vendor may consider it void, and retake his goods without breach of the peace, or maintain replevin or trover for them; or he may affirm the sale and sue for his purchase money." 2 Pars. on notes and bills, 206.

Indeed it may be stated as a general principle of law applicable to contracts, to be found running through all the books, that fraud renders a contract voidable and not void; that it is at the option of the party upon whom the fraud is practiced to avoid or affirm the contract. If he chooses to do so, he has the undoubted right to affirm the contract, notwithstanding the fraud practiced upon him.

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But it is urged that inasmuch as *Stewart* committed a felony in transferring the notes to the plaintiff, knowing them to be forged, no title passed by the sale any more than if *Stewart* had stolen the mare from the plaintiff. If *Stewart* had stolen the mare from the plaintiff, he could not, of course, by a sale to the defendant, have conferred any title upon him. But *Stewart* acquired the mare by means totally distinct from, and utterly inconsistent with the idea of a larceny, viz: By a purchase of her from *Cafferty*, and a delivery of her to him by *Cafferty*, with intent to part with his title.

“Where a vendor has acquired possession of property wrongfully, and without the knowledge, connivance, or assent of the owner, as where he has stolen or found them, or holds them merely as bailee, with no express or implied authority to sell, the original owner may reclaim them from the hands of a subsequent *bona fide* purchaser for a valuable consideration.” 2 Story on cont., sec. 851, B.

But when one has purchased property and received possession from his vendor, the latter intending by such sale and delivery to pass the title, an entirely different rule prevails. Fraud on the part of the vendee, we have seen, authorizes the vendor to avoid the sale, but does not render it absolutely void; and it seems to us to make no difference in principle, whether the fraud be innocent, in a criminal sense, or whether it be punishable as a crime.

We have seen that if *Stewart* did not know that the notes were forged, the contract of sale was voidable merely; in such case *Stewart* committed no crime. It seems to be an absurdity to say that *Cafferty's* right of affirming the sale, depends upon *Stewart's* knowledge, or want of knowledge, of the character of the paper; that if *Stewart* did not know that the notes were forged, *Cafferty* might affirm the sale, but if *Stewart* had such knowledge, *Cafferty* could not affirm it, because *Stewart* had committed a crime.

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If the sale to *Stewart* were absolutely void, whereby no title whatever passed, it is utterly incapable of confirmation or ratification. *The State v. The State Bank*, 5 Ind. 353; *Trueblood v. Trueblood*, 8 Ind. 195.

It seems to us, on principle, that whether the fraud of the vendee amount to a crime or not, the vendor, himself being innocent, must have the option of avoiding or affirming the sale. But on this point, the authorities fully sustain the view we take. Thus, in *Mowry v. Walsh*, 8 Cow., one *Stevens* had presented to the plaintiff a forged paper, purporting to be signed by *Isaac Bishop*, mentioning *Stevens* as a person who wished to purchase cotton goods, as one who might be safely trusted, and assuming to pay whatever amount the plaintiff might supply him with. On the strength of this forged paper, the plaintiff sold *Stevens* goods, which he afterwards sold to another person. It was held, notwithstanding the forgery, that the person thus purchasing the goods from *Stevens*, could hold them as against the plaintiff. So also, in the cases of *Malcom v. Loveridge*, 13 Barb. 372, and *Keyser v. Harbeck*, 3 Duer 373, it was held that where one purchased goods under such false pretences as were punishable under the *New York* statute, as a felony, the sale was not void, but voidable only at the option of the vendor, and that a purchaser in good faith from the vendee, would hold them against the original vendor.

It may be conceded, for the purposes of this case, that it was a rule of the common law that where a party possessed himself of property by means of a felony, he thereby acquired no title, and could confer none upon his vendee. But while that was a rule of the common law, it was also a rule that forgeries, obtaining goods under false pretences, and other frauds of that description, were not felonies. "Forgery," says *Blackstone*, "may with us be defined at common law, to be the fraudulent making or alteration of a writing, to the

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prejudice of another man's right; for which the offender may suffer fine, imprisonment, and pillory." 4 Sharswood's Black. 247. The crime of forgery was not a felony, any more than was the obtaining of goods under false pretences, as it did not involve a forfeiture of goods, which was an inseparable incident to felony. *Id.* p. 96. Hence, there never was any rule of the common law, that a party who had acquired goods by a sale and delivery to him although such sale and delivery may have been induced by forgery or false pretences on his part, acquired no title which he could convey to a third, innocent, person.

The common law rule, both in its reason and spirit, assumes that a person who has acquired goods by means of a felony, has acquired them by other means than a purchase from the owner, and a delivery by the owner, with intent to part with his title.

We think it may be safely asserted that, at common law, where a man sells and delivers goods, with intent to part with his title, although the sale may have been induced by forgery, false pretences, or other fraud, on the part of the vendee, the sale will be good, at the option of the vendor.

But the legislature have, by statute, made both forgery and the obtaining of goods under false pretences, felonies.

How shall these statutes be construed? Shall they be held to affect those only who are guilty of the offences, or shall they be construed to affect the rights of third persons growing out of contracts? We think, on the most obviously just principles, these statutes should affect those only who are guilty of the offences named. They should not be held to either abridge or enlarge the rights of third persons, who are innocent of any wrong. In short, they should not be held to make a contract void, so far as innocent parties are concerned, which was only voidable at common law.

Stewart, then, when he purchased and received possession
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of the mare, acquired a defeasible title to her, the contract of sale not being absolutely void. That title might be rendered absolute, or totally defeated, at the option of *Cafferty*.

This brings us to the question, which has been in some measure anticipated, whether, under the circumstances, *Bell*, the defendant, acquired a valid title to the mare, as against the plaintiff, by his purchase from *Stewart*? It is conceded by the agreement that *Bell* purchased in good faith, without notice of the fraud, and for a valuable consideration.

It is sometimes said that a vendor of chattels, (the English law of market overt not being adopted in this country,) can convey to his vendee no better title than he himself has. This proposition is by no means universally, though it may be generally true. The proposition applied to the case before us, would defeat the defendant's title; for if he stands in *Stewart's* shoes, with no better title than he had, the defeasibility of that title still continues; and the plaintiff, having signified his election to avoid the contract, by demanding the property, would be entitled to recover.

But cases like the present are not embraced in the general proposition stated; or perhaps it would be more correct to say that they are exceptions to that general rule. We think, both on principle and authority, the law will give to a party standing in the position of the defendant, a valid title as against a party standing in the position of the plaintiff.

Either the plaintiff or the defendant must lose the mare. Upon whom should the loss fall? The plaintiff sold and delivered the mare to *Stewart*, intending to part with his dominion over her. He gave *Stewart* the *indicia* of ownership, and thus enabled him to perpetrate a fraud on the defendant, unless the latter can hold the property. Both the plaintiff and defendant are innocent of any wrong; but as the plaintiff, by his own act, enabled *Stewart* to perpetrate a fraud upon the defendant, it would seem but right that the loss should

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fall upon him, on the "broad general principle that where one, of two innocent persons, must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Broom's Max. p. 456. But we pass to the authorities bearing directly upon the question.

It is laid down that, "a party who obtains the goods from the fraudulent purchaser, without notice of the fraud, in the usual course of trade,—that is who gives value for them, makes advances upon them, incurs responsibilities upon them, or receives them in pledge for money or property loaned upon the strength of them,—may hold the goods against the vendor, being a *bona fide* purchaser." 2 Hilliard on Torts, p. 147.

Again it is laid down by an elementary writer, that where a party "has voluntarily parted with his property or goods, and given a title therein to the vendee, he can not reclaim them from a third party, who has become a purchaser from such vendee, for a valuable consideration, without notice on the ground of fraud by his own vendee; for although fraud renders the contract voidable, it does not render it *ab origine void*. And, therefore, as the original owner has voluntarily parted with the goods, and given to his vendee a title which is good until it is avoided, it is through his own act that the vendee is enabled to resell, and a *bona fide* purchaser without knowledge of the circumstances, ought not, therefore, to suffer." 2 Story on Cont., sec. 851 c.

Some of the cases fully sustaining the doctrine will be referred to. The case of *White v. Garden*, and another, 5 Eng. L. and Eq. R. 379, is much like the present in its facts. There, one *Parker* had purchased some iron of the defendants, for which he paid in accepted bills. He gave to the defendants a false address, and represented that the acceptor of the bills was a seedsman in *Rochester*; whereas, no such person could be found. *Parker* had sold the iron to the plaintiff. The

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plaintiff was held to be entitled to the iron on the ground that the original contract was good at the option of the defendants; and after the plaintiff had purchased the iron from *Parker*, the defendants could not set up the fraud practiced by him. To the same effect are the cases of *Stevenson v. Newman*, 16 Eng. L. and Eq. 401; *Kingsford v. Merry*, 34 *id.* 607; *Jennings v. Gage*, 18 *id.* 610; vide note 1 to 2 Kent Com. p. 694, 10th ed. The case of *Load v. Green*, 16 M. and W. 216, may be cited as bearing upon the question.

In the case of *Rowley v. Bigelow*, 12 Pick. 307, 312, the Court, after stating the proposition, that a vendor can not recover the property from one who has in good faith purchased of a fraudulent vendee, say: "The ground of exception in favor of the latter is, that he purchased of one having possession under a contract of sale, and with title to the property, though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud, and without notice of the fraud of the first purchaser, he takes the title freed from the taint of fraud."

In *Caldwell v. Bartlett*, 8 Duer. 341, the Court lay down the following propositions, in support of which numerous authorities are cited: "One who tortiously possesses himself of another's goods, without a delivery from, or the consent, express or implied, of, the true owner, can vest no title even in a *bona fide* purchaser. But when the owner delivers possession of chattels, intending at the same time to part with his property in them, any one *bona fide* purchasing them from the person to whom they were so delivered, will obtain a title valid as against the first owner, though he may have been induced to sell and deliver them by fraud and false pretences, which would authorize him to disaffirm the contract, and reclaim them from the person to whom he delivered them."

In *Keyser v. Harbeck*, *supra*, the Court lay down the rule as follows: "Where there has been a sale and delivery under

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it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor." This seems to be as clear and as accurate a statement of the law on the subject, as any we have found in the books.

In *Tycomb v. Wood*, 38 Maine, 561, it was held, that a sale of property, in exchange for that which is stolen, is not *ipso facto* void, but voidable at the option of the vendor; but that he could not hold it against a purchaser in good faith from the vendee. There are other cases, to the same effect, running through the books, but we shall not extend this opinion, which has already become prolix, by bringing them together.

Per Curiam.—The judgment below is reversed, with costs, and the cause remanded.

N. O. Ross and *R. P. Effinger*, for the appellant.

H. J. Shirk and *Lyman Walker*, for the appellee.

VAIL et al. v. MCKERNAN.

MORTGAGE SALE BY STATE—CONTRACT.—Where the Auditor and Treasurer of State, on a Saline Fund mortgage, on which the mortgagor, and the persons holding under him, have failed to pay the interest, offer the mortgaged property for sale, for the collection of a larger sum than the amount actually due upon the mortgage debt, at the date of the sale, and no person offers to purchase the property at the excessive price demanded, and the same is therefore purchased by the State, at such excessive price, the sale so made to the State will be void, by reason of such excess, and a subsequent sale thereof, by the State to another person, will also be void, be-

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21	421
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cause the State, by her purchase, having acquired no title, can transmit none.

ONUS PROBANDI.—A person who seeks the interposition of the Courts to avoid a sale of lands, except, perhaps, in the case of tax sales, assumes the *onus* of showing that he is entitled to the relief asked.

EVIDENCE.—In such case, copies from the books of the Auditor of State, duly certified, would be legal evidence to show the condition of the account for principal and interest against the mortgagor.

RULES OF CIRCUIT COURTS.—A rule of the Circuit Court, which requires parties desiring a change of venue to make their applications therefor at least one day before the day on which the cause is set for trial, is within the power of the Court to regulate the transaction of the business therein, and valid.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—In 1841, *Charles Garner* mortgaged a tract of land to the State, to secure a loan of 500 dollars, made to him out of the Saline Fund. The land subsequently passed by sale to successive purchasers, subject to the mortgage, and finally came to the hands of *James H. McKernan*.

In 1860, the land was sold on the mortgage, for an amount due on the same, alleged to be 637 dollars and 25 cents, exclusive of damages, &c., to *Mary A. Vail*, and a warrant was issued by the Auditor of State to the sheriff of *Marion* to put her in possession.

McKernan procured an injunction to restrain the sheriff from executing the warrant; and he prayed that the sale by the State be vacated and held void, because it was illegally made, there having been due, when it was made, but 607 dollars and 25 cents, exclusive of damages, &c., and not 637 dollars and 25 cents.

One paragraph of the answer was the general denial. This put upon the plaintiff the burden of proving the negative allegation in his complaint, that the sale was not made, by the

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State, in the first instance, for the sum actually due. *Maynes v. Moore et al.*, 16 Ind. 116. And the case, by agreement of parties, seems to have been tried upon this single question. The Court below set aside the sale as void.

The first point to be settled, then, is, how much was due at the time of the offer to sell on the mortgage by the State? On this point, the case is clear. When *Garner* made the loan from the State, an account was opened with him by the Auditor of State, who kept the debits and credits, on his books. He charged *Garner*, on one side, with the principal sum loaned, and the annually accruing interest, and, on the other, he credited him with the amounts paid on the interest. All the amounts paid were paid on the interest. This is shown by the receipts. They did not, in all cases, express any particular year's interest, but that the amount was paid on account of interest on the loan. We copy one as an example:

"No. 7646. OFFICE OF TREASURER OF STATE, \$163 56.
Indianapolis, Nov. 30, 1860.

"Received of *Charles Garner* the sum of 163 dollars and 56 cents, on account of interest on Saline Fund Loan, 182.

"J. P. DRAKE, Treasurer."

The State received and used all the moneys thus paid. There was nothing for the officers of State, or any other person, to do, who wished to ascertain the amount due on the *Garner* loan, but to add up and balance the debit and credit sides of the account. The account showed, that, when the State offered the mortgaged premises for sale, there was due on the mortgage 607 dollars and 25 cents. The officers made a mistake in casting up and balancing the account. Copies of the Auditor's books, duly certified, were legal evidence to show the state of the account. This proposition is deducible from 1 G. & H. p. 119, requiring the Auditor to keep accounts with

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State debtors, and 2 *id.* p. 183, sec. 283, making copies of his books evidence. The copies of the receipts, given in evidence, were not objected to, and no question, therefore, is before us on their admissibility. Those receipts, with the admissions in the cause, sustain the judgment. See *Williamson v. Doe*, 7 Blackf. 12, as to the old law touching school commissioners' entries. But see 1 Greenl. Ev. 10 ed. p. 215, sec. 147.

The amount, then, for which the property should have been offered for sale was 607 dollars and 25 cents, with damages, &c. The amount for which it was offered was 637 dollars and 25 cents, with damages, &c.; and the question now is, what was the effect of this offer for sale, and sale upon an erroneous amount?

The statutory duty and power of sale were thus prescribed and given, viz: "to advertise the mortgaged premises sixty days in one or more newspapers of this State, and make sale of so much of the same as will pay the principal and interest secured by said mortgage, with five per centum damages, and the costs of advertising the same; and if said land will not sell for so much ready money as will pay the principal, interest, damages, and costs as aforesaid, it shall be the duty of the Superintendent to buy the same for the benefit of the *Indiana* College; and immediately, if possible, or at any time thereafter, he may proceed to sell said land to the highest bidder," &c. R. S. 1831, p. 500, sec. 7.

By this statute two sales are authorized. The first must be upon an offer of the mortgaged premises, or so much thereof as will bring that sum, upon the sum due on the mortgage, with five per cent. damages on that sum, and the costs of advertising. If no sale takes place, on this offer, to a third person, the State may become the buyer, and afterwards resell, &c. But the second sale can not, according to the statute, regularly take place till there has been an offer upon the mortgage for the sum due upon it, with the five per centum

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and costs, and a purchase, on failure of other bidders, by the State, for that sum. In the case at bar, the first offer of sale required by the statute was never made; nor did the State purchase, on a failure of other bidders, on such offer; for an offer of sale upon 637 dollars and 25 cents, with damages, &c., is not an offer upon 607 dollars and 25 cents, with damages, &c. The State purchased in the land, then, without any legal offer of sale having been first made, and afterwards sold it to *Vail*; and the question is, did *Vail* get any title? If the State had none when she sold, of course, *Vail*, as buyer, got none. Did the State acquire any title by her purchase? In *Doe v. Chunn*, 1 Blackf. 336, Judge *Scott* says: "To take private property by public authority, even for public uses, without a just and fair equivalent, is contrary to the fundamental principles of free government. Any statute, therefore, which goes to divest the title of a citizen to real estate, although it may be for the public good, must be strictly construed. Its provisions can be enforced no further than they are clearly expressed."

In *Williamson v. Doe*, 7 Blackf. 12, Judge *Dewey* says:

"It is evident that the powers of the commissioner, above specified, are limited, special, naked powers, not coupled with an interest. The law respecting such powers is, that they must be strictly pursued to render valid the acts of the agent possessing them. The facts on which the right to exercise his powers depends, must exist, or his transactions will be without authority and void."

This is the doctrine of *Doe v. McQuilkin*, 8 Blackf. 335; *id.* 581; *Stevenson v. Doe*, *id.* 508. See, also, *Bansemmer et al. v. Mace*, 18 Ind. 27; *Patterson et al. v. Reynolds*, 19 *id.* 148. The same doctrine is held in *Doe v. Collins*, 1 Ind. 24; in *Hutchins v. Doe*, 3 *id.* 528; in *Skelton v. Bliss*, 7 *id.* 77, and in *Maynes v. Moore*, 16 Ind. 116.

In this class of cases, it is not a question of good faith, but

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of power and conformity to prescribed modes of action. And the purchaser buys at his peril. This is the law which persons are bound to take notice of. Hence, persons intending to purchase, may be presumed to examine into the facts of the case prior to the sale, and to be influenced by those facts. Hence, irregularities would be presumed to operate injuriously upon the sale, as intended bidders, knowing the effect of them, would be deterred from bidding. *Olmstead v. Elder*, 1 Selden, 144, and cases cited. We think the State acquired no title by her alleged purchase, and, of course, could transfer none to *Vail*.

One other point. *Vail* applied for a change of venue on the day the cause was set for trial. A rule of Court required such application to be made, at least, one day before the day on which the cause, in which the change was applied for, was set for trial. We see nothing unreasonable in this rule. It strikes us as judicious; and the Court, both inherently and by statute, has power to prescribe reasonable rules for the regulation of business therein.

Per Curiam.—The judgment below is affirmed, with costs. *Wm. Patterson and N. B. Taylor*, for the appellants.¹

McDonald & Porter, Thos. A. Hendricks, and Oscar B. Hord, for the appellee.²

(1) The counsel for the appellants argue: The notice given by advertisement, in which the amount alleged to be unpaid is stated, is intended for the party as well as for the world, and he has an opportunity to apply to chancery if he wishes to arrest the sale on the ground of the excess demanded; and if he stands by and suffers the sale to go on, and an innocent party to purchase, unconscious of the latent defect, and without any means of knowing it, the purchaser will have the better claim to equitable protection. *Bartlett v. Henry*, 10 Johns. Rep. 187; *Klock v. Cronkhite*, 1 Hill R. 110; *Bansmer v. Mace*, 18 Ind. 27.

In such sale the officers may fairly have been presumed, by the

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purchaser, to have acted according to law. *Givan v. Doe*, 5 Blackf. 262; 1 Blackf. 210; 4 *id.* 230; 3 Dana, (Ky. Rep.) 621; 8 B. Mon. 385; 1 Gilman, 441; 2 Bibb. 401; 1 Hilliard on Mort. 132.

(2) The counsel for the appellee argue: It was the duty of the purchaser to take notice of the irregularity in the proceedings of the officers. It can not avail her to say that she was ignorant of it. The principle of *caveat emptor* applies to such sales. *Gantley's Lessee v. Ewing*, 3 How. 707; *Heimer v. Wilcox*, 1 Ind. 29.

The proceedings of the State officer, in making the sale herein, were *ex parte*, and, to be valid, they must strictly follow the law, and a sale for any excess over the amount actually due at the time, will vitiate the whole proceeding. *Doe ex dem. Weed v. McQuilkin*, 8 Blackf. 335; *McQuilkin v. Doe*, 3 Ind. 581; *Hutchins v. Doe*, *id.* 528; 3 Gilman, (Ills.) 32; Hilliard on Mort. 130, c. 7; 3 Litt. 415.

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HUSBAND AND WIFE—TORTS OF WIFE.—The husband is liable for the torts and frauds of his wife, committed during coverture. If committed in his company, or by his order, he is alone liable. If not, they are jointly liable, and the wife must be joined in the suit with the husband.

SAME—EVIDENCE.—If husband and wife are jointly prosecuted in a civil action for the tort of the wife, in the alleged burning by her of a mill, it is competent for the plaintiff to prove that, within a short period before, and just preceding the burning, the wife was heard to threaten that, "she would burn it; that she would put a torch to it; that it should not stand much longer; that the old rattle trap should be burned up," &c.

APPEAL from the *Boone* Circuit Court.

WORDEN, J.—This was an action by *Ball* against *Frederick*

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Bennett, and *Mississippi Bennett*, his wife, and another, to recover damages for an alleged trespass of the defendants in setting fire to and burning up a certain saw mill, machinery, lumber, &c., of the plaintiff. Answer in denial. Verdict and judgment for the defendants.

On the trial, the plaintiff having proven his ownership of the property, and that it was destroyed by fire on the night of the 10th of *July*, 1863, then offered to prove by a competent witness that said *Mississippi* had repeatedly been heard to say, at different times and places, within thirty days prior to the burning of the mill, and coming down to a few days before that event, "that she would burn it; that she would put a torch to it; that it should not stand much longer; that the old rattle trap should be burned up."

The defendants objected to this testimony and it was rejected; the plaintiff excepting.

This testimony, it seems to us, was relevant and competent to go to the jury as having a tendency to show that said *Mississippi* set fire to the mill, or caused or procured it to be done. The weight that should be attached to the threats thus made would, of course, be for the determination of the jury, under all the circumstances of the case. If the said *Mississippi* were a *femme sole*, and were she alone sued for burning the mill, there can be no doubt that the evidence offered would be competent against her. How is the case altered by the fact that she is married, and that she and her husband are sued for the tort which the evidence offered had a tendency to fasten upon her? "The husband is liable for the torts and frauds of the wife committed during coverture. If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with the husband." 2 Kent Com. 143, 10th ed.

The evidence was rejected on the ground, apparently, that the admissions or declarations of the wife could not be given

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in evidence against the husband. We do not regard the evidence offered as coming within the rule that excludes the admissions of the wife against the husband. The threats offered to be proven had not the character of admissions, or, as they are sometimes loosely styled, declarations, merely. They were facts; and such facts, it may be observed, as had a tendency to show that the wife burned the mill or caused it to be burned, and if she did, then her husband is liable for the act. It may be admitted, for the purposes of this case, that if the wife, after the mill was burnt, admitted that she burnt it, the evidence could not be received against the husband. This would be an admission. But if, before the mill was burnt, she threatened to burn it, that was a fact which was just as competent to be shown against the husband as any other fact having a tendency to show that the wife committed the tort. A late writer, in speaking of the rule that excludes the declarations of husband or wife, says: "The rule does not extend to declarations of the parties which are in the nature of facts, for in such cases the presumptions which are made are not founded on the credit of the party, but of the fact." Cord. on Rights of Married Women, § 1,036.

The evidence offered, we think, was competent against the husband and wife, hence the judgment must be reversed.

Per Curiam.—The judgment below is reversed with costs, and the cause remanded for a new trial.

John Pettit, for the appellant.

Dougherty & Hamilton, for the appellee.

Larimore v. Hornbaker.

LARIMORE v. HORNBAKER.

TENDER—TIME OF.—Where the time and place of delivery are fixed by the contract, a tender of the property to be delivered, to be valid, must be made a reasonable time before sunset on the given day, and must be continued until that time, unless the party who is to receive the property tendered appear sooner, and, if he be present, a tender to him at any time on the day is good.

CONTRACT—CONSTRUCTION.—A large part of the opinion herein relates to the construction of a contract, which can not be briefly stated. See opinion.

APPEAL from the *Monroe* Common Pleas.

PERKINS, J.—The following agreement and assignment were executed :

“Agreement entered into between *John Larimore*, of the one part, and *John W. Hornbaker* and *George W. Reeves*, of the other part, witnesseth : That whereas said *Larimore* has this day sold said *Hornbaker* and *Reeves* a certain jack called *Black Warrior* ; said *Hornbaker* and *Reeves* bind themselves to deliver to said *Larimore* all the mule colts that said jack may get during the ensuing season ; said colts to be delivered at *Smithville*, in *Monroe* county, *Indiana*, on the 20th day of *September*, 1861, sound, free from blemishes and in good condition ; said *Larimore* agrees to pay said *Hornbaker* and *Reeves* 50 dollars for each of said colts when delivered.

“JOHN LARIMORE,

“JOHN W. HORNBAKER,

“GEORGE W. REEVES.”

“Attest: *M. C. Hunter*.”

“I assign all my interest in the within article of agreement to *John Hornbaker*, without recourse.

“GEORGE W. REEVES.”

“Attest: *J. S. Smith Hunter*.”

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The foregoing agreement meant that *Hornbaker* and *Reeves* were to deliver to *Larimore* all the colts got by the jack which were sound and free from blemish; and that they were to be delivered in good condition; the agreement might be read thus: Said *Hornbaker* and *Reeves* agree to deliver at, &c., to, &c., all the colts, &c., that is to say, all the colts which are sound and free from blemishes; and that they are to have them in good condition when delivered.

This, we think, upon consideration, is the most reasonable interpretation to be given to the agreement, though it is possible it may not express the intention of the parties. The agreement, in case there happened to be unsound mules gotten, would be contradictory in its literal application.

The contract was not operative as a sale of the colts, but was good as an executory agreement to furnish and sell them at the time and place and upon the terms specified. See the cases cited in *Morrill v. Jones*, Am. Law Reg. vol. 12, p. 18; also, *McConnell v. Jones*, 19 Ind. 328; 14 *id.* 158. Such being the meaning and nature of the contract the obligations of the parties were these: *Hornbaker* and *Reeves* were bound to tender to *Larimore*, in good condition, at *Smithville*, on *September 20, 1861*, all the sound unblemished colts gotten during the specified season by the jack *Warrior*; and *Larimore* was bound to be at that place on that day to receive and pay for the colts, and to actually receive and pay for them at the rate of 50 dollars a head, if they were legally tendered.

Hornbaker, for himself, and as assignee of *Reeves*, claims that he did legally tender the colts, and that *Larimore* wrongfully refused to receive and pay for them. Hence, he claims that he has a right of action against *Larimore*.

The facts relative to the condition and tender of the mules are these: The jack was put to seventy-two mares and he got forty-four or forty-five colts. All the colts that lived were brought to *Smithville*, the place for delivery, about one

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o'clock on the 20th of *September*, 1861, but were never separated from the mares, which they followed to the place. *Larimore* was not there at the time, and *Hornbaker*, thinking *Larimore* was not coming to receive them, commenced disposing of the colts to those whose mares brought them, and by whom more than half of the colts were taken away between the hours of one and five o'clock in the afternoon, the time at which *Larimore* arrived at *Smithville* to receive them. The sun set on the 20th of *September* at six o'clock. When *Larimore* arrived *Hornbaker* asked him "if he was going to take the mules." *Larimore* replied, asking where they were. *Hornbaker* answered, "that they had all been there; that some of them had been taken away, but he could have them all back that night." *Larimore* replied that he was not bound to receive them after night." *Hornbaker* then started after the mules and brought them back about half past eight o'clock. *Larimore* had left about seven o'clock, and was not present to receive the mules. The mules were sound, but rather under size, owing perhaps to the jack having been put to too many mares—from fifty to sixty were as many as the jack ought to have served. If a jack is pressed to too many mares, the colts will be smaller and less vigorous than otherwise. The period of gestation is from eleven to twelve months.

Waiving the point as to the condition of the colts, (and *Larimore* was bound to receive only those that were sound, unblemished and in good condition,) we pass to the question of the tender. Was the tender, supposing it to have been otherwise sufficient, kept up to the proper time? In other words, was *Larimore* at the place of tender to receive the colts in proper time?

The contract was one in which the time and place of delivery were fixed by the contract. In such contracts, tender must be made a reasonable time before sun set on the given

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day; at least, the tender must be continued till that time, viz: a reasonable time before sun set, if the party who is to receive the article does not appear till that time; though, if he be present, a tender to him at any time on the day is good. This is the doctrine laid down in *Startup v. Macdonald*, 6 M. & G. 593. It is the law. Smith on Cont. 429; 1 Par. on Cont. 445; 2 *id.* 162, note v; *Sweet v. Harding*, 19 Vermont, 587.

The case was not tried below with reference to this established rule of law, and we are not satisfied with the result of that trial. We can not say that one hour was not long time enough to receive or reject forty-two mules, or such parts of them as might be received or rejected, after the mules had been properly set apart and tendered at the place designated.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded for another trial.

Samuel H. Buskirk, Joseph E. McDonald and A. L. Roache, for the appellant.

Newcomb & Tarkington, for the appellee.

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 DRAKE v. MARKLE.

PROMISSORY NOTE.—The following instrument is a promissory note:

"No. 7. *Farmers' and Mechanics' Bank, Indianapolis, April 26th, 1855. Jacob Markle* has deposited in this bank seventy-five hundred and eighty-four dollars, payable to the order of himself, in currency, on return of this certificate. *A. May, Prest.*" Indorsed on the back: "*J. P. Drake, A. May.*"

SAME—NEGOTIABLE.—Such a note is negotiable by indorsement, under the law of *Indiana*, and the legal presumption is, that *Drake* and *May* placed their names upon it as indorsers.

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EVIDENCE—CONTRACT.—In an action upon such a note against the indorsers, as makers or otherwise, parol evidence is inadmissible to prove that they, by their indorsements, intended to assume any other relations to the paper than those of indorsers.

CASES OVERRULED.—The cases of *Wells v. Jackson*, 6 Blackf. 40; *Early v. Foster*, 7 id. 35; *Harris v. Pierce*, 6 Ind. 162; *Cecil v. Mix*, id. 478; *Snyder v. Oatman*, 16 id. 265, and *Sill v. Leslie*, id. 236, so far as they are inconsistent with the decision in this case, are overruled.

APPEAL from the *Marion* Circuit Court.

HANNA, J.—*Markle* held, and sued *Drake* upon, an instrument in writing as follows:

"No. 7.

FARMERS' AND MECHANICS' BANK,
Indianapolis, April 26th, 1855.

"*Jacob Markle* has deposited in this bank seventy-five hundred and eighty-four dollars, payable to the order of himself, in currency, on return of this certificate. A. MAY, Prest."

Indorsed on the back of it: "*J. P. Drake, A. May.*"

The Court permitted parol evidence of the purpose and intent of *Drake*, in placing his name upon said paper. The only point made here is upon said ruling of the Court.

It has been held by this Court for a number of years, whatever may be the decisions in other States, that where a blank indorsement is made on that kind of paper, and, under circumstances wherein the relation of the person so placing his name to the maker, and his liability to the holder of said paper, are not fixed by known rules of law, arising out of, and applying to, said act, parol evidence may be given to fix his liability; that is, the capacity in which he was to be held liable. Does this paper come within that rule?

This instrument, it appears to us, contains the requisites of a promissory note, as stated by the Supreme Court of the

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United States, in *Miller v. Austin*, 13 Howard, 218, to-wit: "that a promise to deliver, or to be accountable for, so much money, is a good bill or note." No precise form of words is essential to the validity of a promissory note. Byles on Bills, side p. 5. But it must be an absolute promise, in writing, signed, but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer. *Id.* 4. It has been held, that a certificate of deposit falls within the definition of a promissory note. 13 Howard, 218; *Corey v. McDougald*, 7 Georgia, 84; *Lowe v. Murphy*, 9 *id.* 338.

Having thus arrived at the conclusion that the paper was the promissory note of the bank, it is material to inquire whether it was negotiable or not, as both classes of paper are not subject to the same rule. *Snyder v. Oatman*, 16 Ind. 265; *Bowers v. Headon*, 4 Ind. 318; *Burnham v. Gallentine*, 11 *id.* 295; *Vore v. Hurst*, 13 Ind. 551; *Cecil v. Mix*, 6 Ind. 478; *Sill v. Leslie*, 16 *id.* 236. The rule, as to negotiable paper, is, that persons, who may thus indorse, are presumed to have bound themselves as indorsers. See cases in 16 Ind. and 13 *id.*, before cited. But, in this State, it has been repeatedly held, that such presumption may be overcome by parol evidence, that they signed with the intention of becoming bound as makers. *Wells v. Jackson*, 6 Blkf. 40; *Early v. Foster*, 7 Blkf. 35; *Harris v. Pierce*, 6 Ind. 162, and cases already cited. In some of these cases, it is intimated that such evidence is admissible to show that the person so indorsing did it as a guarantor, and should be held liable as such. *Harris v. Pierce*, 6 Ind. 162.

It is as to the correctness of this latter proposition that our attention is specially directed by counsel; that is, as to the admissibility of such testimony touching the liability of such an indorser, as a guarantor, in view of the statute of frauds, in regard to answering for the debt of another, &c.

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By our statute, 1 G. & H. 447, "all promissory notes, signed by any person who promises to pay money, or who acknowledges money to be due, shall be negotiable by indorsement thereon." If we are correct, that the writing sued on is a note, it is negotiable under this statute, and, *prima facie*, Drake and May placed their names upon it as indorsers, and, without explanation, could only be liable as indorsers.

The payee brings this suit. He does not attempt to charge them as indorsers, if he could so charge them, of which we express no opinion, but avers that they signed or indorsed in the capacity of guarantors, &c.; and as such, he seeks to charge them by parol evidence. Could he do so legally?

A guaranty is a promise made upon a good consideration, to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is, in the first instance, liable to such payment or performance. 1 Bouvier's Law Dict. Smith on Mercantile Law, p. 447, under the head of guaranties, employs the same language in the definition thereof, except that he says nothing therein as to the consideration. The statute of frauds provides, that "no action shall be brought * * to charge any person, upon any special promise, to answer for the debt, default or miscarriage of another, * * * unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the person to be charged therewith," &c. 1 G. & H. 848.

This suit is brought, we suppose, upon the assumption that, under this statute, the writing, &c., therein mentioned, is only necessary to evidence the contract, not to constitute it; or, upon the assumption that the facts do not bring the agreement within the statute. As to the latter part of the proposition, the great weight of authority is to the effect that a guaranty is within the statute, where it is not founded upon

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some new consideration. Smith's Mer. Law, 447, 65 and auth.; Bouvier's L. Dict.

This Court has repeatedly held, that the statute applies to the rules of evidence, and not of pleading. *Mills v. Kuykendall*, 2 Blkf. 47; 8 *id.* 24; 4 Ind. 488; 6 *id.* 53. See, also, 1 Chitty's Pleading, 301-4. Whether the present statute, namely, that "when any pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleading," 2 G. & H. 104, should be construed to affect these decisions, we need not inquire.

Plainly, then, this was, as averred, an undertaking by *Drake* to pay to *Markle*, or order, the amount of money by him deposited, if the person, that is, the bank, with whom the deposit was made, did not pay. It was, as averred, a collateral undertaking. Clearly, it was an agreement to answer for the debt of another. Whatever subtlety may have been thrown into the reasoning in opinions that have been pronounced, it appears to us, the plain intention of this statute is to require that the evidence to establish such an agreement shall be in writing. Here is merely *Drake's* name on the back of a note. The legal presumption is, that he signed as an indorser. As such, he would be entitled to certain fixed and settled rights. The contract which the law would fix upon him, in the absence of any explanation of the act of placing his name in that position, is sought to be changed, or rather set aside, and another and different contract put in its place. Very well; but to establish this latter character of undertaking, certain evidence is required by a positive statute. That form of testimony is not resorted to, or produced. In view of this statute, we can not see how a collateral contract, to answer for the debt of another, can be shown, by parol, to have been entered into or intended, by the mere writing his name, by *Drake*, on the back of the note of such other person. It is really making a contract between the parties,

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which, in the absence of such evidence, the law would not intend from the act performed. It may be said that the contract was made previous to, and distinct from, the act of indorsing the name of the promissor on the note. That is probable; but what was that contract? The plaintiff says he will show by the oral testimony of these witnesses. Perhaps no general principle would be violated in doing so, in the absence of positive law. But we are met by the positive statute, which forbids the establishment of the fact by oral testimony. This may operate oppressively in individual cases, but the law is thought to be necessary to guard against frauds and perjuries.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further trial.

S. Major and O. B. Torbett, for the appellant.

J. E. McDonald and A. L. Roache, for the appellee.

THE BOARD OF COMMISSIONERS OF GRANT COUNTY v. MILES.

TREASURER'S FEES—STATUTES CONSTRUED.—The Treasurer of a County is entitled to five per cent. as commissions, only on the amount he may collect on the delinquent list, to be furnished him by the Auditor, after his *March* settlement with the Auditor, and before he receives the duplicate for the next year.

SAME.—For the amount of taxes collected on his duplicate, as well delinquent as current, after he receives said duplicate, and before he makes his *March* settlement, his compensation is regulated by the Act of June 4, 1861. Acts special session, 1861, p. 41.

APPEAL from the *Grant* Circuit Court.

WORDEN, J.—The question involved in this case, is whether

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a County Treasurer is entitled to five per cent. on the whole amount of delinquent taxes, which he may collect throughout the year; or, whether his compensation for collecting delinquent taxes upon the duplicate, after it is delivered to him, which is to be done between the first *Monday* of *June* and the fifteenth day of *October*, and before he makes his settlement with the Auditor, which is to be done on the third *Monday* of *March*, is to be governed by the act of *June* 4th, 1861, in relation to County Treasurers' fees. Acts spec. ses. 1861, p. 41. The Court below held that, he was entitled to five per cent. on the whole amount collected during the year; upon the amount collected upon the duplicate as well as otherwise. We will notice such of the statutory provisions as seem to furnish a solution of the question.

The tax duplicate is to be placed in the hands of the treasurer for collection, between the times above specified. 1 G. & H., p. 97, sec. 93. The duplicate is to contain, amongst other taxes, delinquent taxes for any preceding year, remaining unpaid. Acts spec. ses. 1861, p. 92, § 78. It is the duty of the Treasurer to proceed to collect the same, for which purpose he is to attend at his office until the third *Monday* of *March* next thereafter. Sec. 94. On the third *Monday* of *March*, the Treasurer is required to settle with the Auditor, who charges him with the amount of the duplicate, less the taxes which are unpaid. Taxes which then remain unpaid are considered delinquent. The Auditor records the list of delinquencies and delivers the same to the Treasurer, who is required to collect the same. Acts spec. ses. 1861, p. 91. After the settlement thus made, the Treasurer is required to call upon every delinquent tax payer of the county, and if necessary, distrain property for the collection of the delinquent tax. 1 G. & H. p. 98, sec. 102. By the next section, it is provided that, on the 15th of *October*, the Treasurer shall file with the Auditor schedules of such delinquent taxes collected,

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and shall receipt to the Auditor for the amounts. Then follows sec. 104, as amended in 1861. Acts spec. ses. 1861, p. 94 as follows:

“The said Treasurers shall be allowed for their services in making such collections, 5 per centum on the amount of all such collections of delinquent taxes, payable in just proportions out of each fund collected, and shall also be allowed constable’s fees and mileage, from the place of holding elections in each township, to the residence of each delinquent tax payer, which shall be collected from such tax payer.”

Taking these provisions together, we are of opinion that it was not the intention of the legislature, that the Treasurer should receive 5 per cent. on the amount of delinquent taxes he might collect on the duplicate, after receiving it and before the *March* settlement, but only on the amount he might collect after that settlement, on the list to be furnished him by the Auditor, and before the duplicate for the next year was placed in his hands. The language of section 104 does not admit of any other construction; it provides compensation for such collections; what collections? Such, as we understand it, as are made upon the lists furnished by the Auditor, by virtue of which the Treasurer is required to call upon the delinquent tax payers, and, if necessary, distrain property.

The same section which allows the 5 per centum, allows also constable’s fees, &c., showing clearly that it was not intended to apply to taxes, though delinquent, which were collected on the duplicate, and for the collection of which the Treasurer is not required by law to go out of his office. For the collection of taxes upon the duplicate, as well delinquent as current, after he receives the same, and before he makes his *March* settlement, compensation is provided in the act of *June* 4th, 1861. Acts spec. ses. 1861, p. 41.

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Per Curiam.—The judgment below is reversed, with costs.
Oscar B. Hord, Attorney General, for the appellant.

McDonald & Roache, *J. Brownlee*, and *W. P. Fishback*, for the appellee.

THE STATE v. MURPHY.

CRIMINAL LAW AND PRACTICE.—For the requisite averments in an indictment for assault and battery with intent to commit a felony, see the opinion at length.

SAME.—In an information for an assault and battery, it should be averred that the offence was committed in an unlawful manner.

APPEAL from the *Daviess* Circuit Court.

HANNA, J.—In this case an indictment charged that the defendant on, &c., at, &c., “did then and there in and upon one *H. M.*, then and there being, make an assault, and him, the said *H. M.*, he the said, &c., did then and there strike, beat and wound, in a rude and insolent manner, with the intent then and there, the said *H. M.*, purposely, feloniously, and with premeditated malice, to kill and murder,” &c. On motion the indictment was quashed.

It is urged that the indictment should have named the instrument with which the battery was committed, and have alleged that it was so committed unlawfully.

The statute provides that, “every person who in a rude, insolent or angry manner, shall unlawfully touch another shall be deemed guilty of an assault and battery.” 2 G. & H. 459. And again, “every person who shall perpetrate an assault, or an assault and battery, with intent to commit a

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felony, shall," &c. *Id.* 438. And again, "if any person of sound mind shall purposely, and with premeditated malice, kill," &c. *Id.* 435.

This is classed with felonies. And again, "the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment." *Id.* 406.

It has been repeatedly held, under these statutes, that a man may be acquitted of the intent and found guilty of the assault and battery, on a charge of an assault and battery with intent to murder. 9 Ind, 363; *id.* 380.

The question in the case at bar is, whether, in view of these statutes and the decisions under them, the assault and battery is sufficiently charged. We are of opinion that it is not in the part charging the assault and battery, when considered alone. We have a law which requires that every criminal offence shall be defined by statute.

Assault and battery is so defined, and consists in the unlawful touching of the person of another in a rude, &c., manner. Touching, beating, &c., in the manner indicated in the statute, are acts charged to have been committed, but whether unlawfully, or in the exercise of a lawful right, we are not informed. So much for that part charging the assault and battery. The intent with which these acts were performed is sufficiently averred to have been to commit a murder in the first degree. The question arises, whether the averment in that part charging the intent "purposely and feloniously, and with premeditated malice, to kill," &c., relates back to the former part of the indictment, or in any manner cures the defect we have already noticed as existing in the attempt to charge the assault and battery.

We are of opinion that, taking the whole indictment together, it is sufficiently shown and charged that the acts performed, to-wit, the assault, &c., were unauthorized and

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unjustifiable, in other words, were unlawful, although that precise word is not used. One man can not strike another with the malicious and premeditated intent to murder him—murder being a technical term—without so doing unlawfully. Therefore, to charge that he did the act and with the intent set forth in the indictment, it appears to us, is tantamount to charging the act in the language of the statute, as unlawful, especially in view of the fact that the exact language of the statute, defining the offence, need not be adopted or incorporated in the indictment.

Per Curiam.—The judgment is reversed, with costs. Cause remanded for further proceedings.

Oscar B. Hord, Attorney General, and *R. A. Clement, Jr.*, Prosecuting Attorney, for the State.

John Baker and *James T. Pierce*, for the appellee.

SYMMES v. MAJOR.

ATTORNEYS—PRACTICE.—Attorneys can not withdraw their appearance in a cause without the permission of the Court, and, if it is withdrawn, and the record on appeal is silent as to the ground of withdrawal, this Court will presume it was done upon satisfactory evidence presented to the inferior Court.

WAIVER—PRACTICE.—In an action in attachment against husband and wife, the latter being insane and over twenty-one years of age, a personal appearance by the husband, and an appearance by the wife with her husband, and also by her general guardian, waives the necessity of publication, and such facts, appearing in the record on appeal, will obviate the necessity for any evidence of publication in the record.

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GUARDIAN—COMMITTEE.—A general guardian of an insane person, under our statutes, is substantially the committee of such person, and is the proper party to appear for her without any special order of the Court.

PRACTICE IN SUPREME COURT.—Where an appearance is entered in the inferior Court, and is never withdrawn, and an appeal is taken to this Court, and the judgment below is reversed and the cause remanded, and, after proceedings there, another appeal is taken to this Court, this Court will judicially know what attorneys have appeared in the cause.

APPEAL from the *Ohio* Circuit Court.

PERKINS, J.—Prior to the *August* term of the *Ohio* Circuit Court, 1858, *James S. Jelly, Esq.*, procured an attachment of certain property of *Hannah B. Symmes*, upon a writ issued from the clerk's office of the above named Circuit Court. At the *August* term, 1858, of said Court, he obtained judgment. *Peyton S. Symmes*, the husband of *Hannah*, was made a co-defendant with her in the attachment suit. *Samuel Seward, William S. Holman* and *Daniel S. Major* severally filed claims under the attachment proceedings of *Jelly*, and obtained judgments at said *August* term. The claim of *Major* was for professional services rendered by him for said *Hannah* touching her separate property in *Ohio* county, *Indiana*, which was attached. The record recites that the Court was satisfied that publication had been duly made, but no copy of it appears. Afterwards, at the *February* term, 1859, this entry appears of record, viz :

Comes *Henry E. Symmes*, who, it is admitted by the parties, has been legally appointed the guardian of the said *Hannah B. Symmes*, an insane person, and also the said *Peyton S. Symmes*, by *A. C.* and *H. A. Downey*, their attorneys, and the plaintiffs in said causes come also, and by agreement of said parties, it is ordered and adjudged by the Court that the judgments in said causes rendered in this Court, on the 11th

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day of *August*, 1858, shall be and they are opened, and said defendants allowed to defend; and it is further ordered, that these cases shall proceed in the name of the said *Peyton S. Symmes*, and the said *Hannah B. Symmes* by said *Henry E. Symmes* as her guardian, as defendants.

Afterwards, the cause of *Major* against the *Symmeses* was continued.

Afterwards, at the *August* term, 1859, the parties came, says the record, and the plaintiff, pursuant to leave given, amended his complaint, making *Henry E. Symmes*, as guardian of *Hannah*, defendant, with *Peyton S. Symmes*. The defendants thereupon filed their joint demurrer to the amended complaint; the demurrer was sustained, and there was final judgment for the defendants. The plaintiff appealed from that decision to the Supreme Court, where the judgment below was reversed, and the cause remanded for further proceedings. That decision is reported in 19 Ind. p. 117. Both parties appeared by counsel in the Supreme Court—the *Symmeses* by *Messrs. McDonald & Roache*. At the *February* term of the *Ohio* Circuit Court, in the year 1863, the cause again appeared upon the docket of that Court, and was called for issue; whereupon the death of *Peyton S. Symmes* was suggested; the demurrer to the complaint was overruled; “and now, says the record, *A. C.* and *H. A. Downey*, attorneys for defendants, come and say that they have been discharged from further acting herein as attorneys for defendants, and refuse to further appear or answer.” As attorneys can not withdraw their appearance in a cause without permission of the Court, and the Court permitted it in this case, we must presume that satisfactory evidence was furnished the Court of the discharge of the *Messrs. Downey*.

Judgment was then rendered against the defendant by default, with an order for the sale of the attached property, &c.,

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upon proof of the claim of the plaintiff, as if the general denial had been in.

At the *August* term, 1868, *Henry E. Symmes*, guardian, &c., appeared in the *Ohio* Circuit Court, by *A. Brower*, his attorney, and moved to set aside the judgment by default at the previous *February* term, and filed the affidavit of one *Charles L. Colburn* in support of his motion.

Major demurred to the causes set forth for vacating the judgment; the Court sustained the demurrer, and dismissed the motion. *Symmes* appealed to this Court. Two questions are presented.

1. Was the judgment by default regular?
2. If so, was sufficient cause shown to set it aside?

At the time the attachment was taken out, *Mrs. Symmes* was a sane woman, and her husband was joined with her as a defendant. There was property in the county subject to the attachment, and the property was attached. So far the proceedings were regular. Notice by publication does not appear in the record. If there was an appearance, that cures the want of a copy of the notice in the record. Was there an appearance? It is not denied that *Peyton S. Symmes*, the husband, and *Henry E. Symmes*, the guardian, of *Hannah B. Symmes* as an insane person, appeared to the suit. It is not denied that they employed the *Messrs. Downey* to defend the suit for them. But it is claimed that the appearance of *Henry E. Symmes*, under the name of guardian, was no appearance, because an insane person must appear by committee.

We are not now required, in the view we take of this case, to decide that an insane *femme covert*, over twenty-one years of age, must appear by guardian or committee.

The code provides (1 G. & H. 375,) that, "all suits relative to such lands [the separate property of the wife] shall be prosecuted by or against the husband and wife jointly, or if they be separated, in the name of the wife alone, and in case

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of such separate suit, the husband shall not be liable for costs." The code further provides, (2 G. & H. p. 41) that "in no case shall the wife be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years."

Nor, if an insane married woman must appear by guardian or committee, are we now called upon to say by which. At page 98 (2 G. & H.) it is provided, that "it shall be duty of the guardian of an infant or committee of a person of unsound mind, or attorney appointed for a prisoner, to file an answer, denying the material allegations of the complaint, prejudicial to such defendant, without oath." At p. 335 of the same volume, it is enacted, that "the phrase of *unsound mind* includes idiots, *non compotes*, lunatics, and distracted persons." And at page 37 of the same volume it is enacted, that "it shall not be necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute."

The proposition we lay down for the decision of this case is, that *Hannah B. Symmes* appeared with her husband, and in addition, by both her guardian and committee. That she appeared with her husband, and that she appeared by her general guardian, there is no dispute. It remains to show that she appeared by her committee.

Who or what is a committee? Our statute does not define the office or officer; in common law practice no such officer is known, and our statute no where prescribes the mode of appointing a committee. In equity, as a part of the common law, such an officer is known, and his powers and duties are defined. In a note to Daniel's Chancery Practice, vol. 1, Perk. ed., p. 105, the language of Chancellor *Kent*, in *Ortley v. Messere*, 7 John. Ch. Rep. 139, is quoted thus: "The committee have the exclusive custody and control of the estate and rights of the lunatic." And in the same volume of Daniel, at page 165, it is said that the committee of a lunatic must be made a co-defendant with the lunatic, and why? be-

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cause the property of the lunatic is in the custody of the committee. See, also, Voorhies' (N. Y.) Code, 3 ed. p. 149.

If, then, the absence of a definition of a committee in our code, we go to the *English* law, we find that it is a person or persons who have the continuous guardianship of the person and estate of a lunatic, until lunacy is displaced by sanity. Now, our law creates just such an office but names the person who fills it, guardian. 2 G. & H. 573. The act touching insane persons provides that if, on the inquest, the person is found to be of unsound mind, "such Court shall appoint a guardian for such person, who shall have the custody of his person and the management of his estate," &c.—just the powers of a committee by the *English* law. Substantially, then, *Henry E. Symmes* was the committee of *Hannah B. Symmes*, and the proper person to appear with her without any special order of the Court.

But the committee spoken of in our statute we can inferentially make out to be simply a person appointed by the court to conduct a given suit, a person with precisely the powers and duties of a guardian *ad litem* or *prochein ami*. See the sections of the statute above quoted. Now, how would the Court appoint such a committee? Why, upon the suggestion of a proper person by some one interested. Who could more properly make the suggestion than the husband and general guardian of a person, or her attorneys? And who would more properly be the person to conduct a given suit than the general guardian? If, then, the Court appointed the general guardian to conduct a particular suit, and the law says the person so appointed is the committee of the lunatic, then, the lunatic in this case appeared by committee in contemplation of law, no matter what misnomer occurred on the part of the Court in designating such person, or whether any designation was made by name or not. We are satisfied there was a proper appearance in the case, which waives the necessity of

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publication. That appearance was never withdrawn. It was continued in the Supreme Court by *Messrs. McDonald & Roache* as successors to the *Messrs. Downeys*. This we know, judicially, because this is one continuous suit before us for the second time, and the whole cause is in the present transcript, including the previous opinion of the Supreme Court. This Court judicially knows what attorneys appear before it in a pending cause.

On the return of the cause to the *Ohio* Circuit Court, the *Messrs. Downeys* did not assume to withdraw the appearance of the *Symmeses*, but only to retire from the cause themselves, because they had been discharged by *Symmes*, who was a party before the Court.

The judgment below can not be reversed for any thing appearing upon the face of the record.

But, as we have seen, at the term succeeding that at which the judgment was rendered, *Mr. Brower* appears as attorney for *Symmes*, and moves to vacate the judgment, and files the affidavit of *Mr. Colburn* in support of it. The motion of *Mr. Brower* is overruled; and he retires from the cause, and is succeeded by *Messrs. McDonald & Porter* in this Court, to which the cause is, a second time, appealed; the second appeal being from the refusal of the Court below to vacate the judgment on the motion and grounds above stated.

Was cause shown, upon the motion, such as made it the duty of the Circuit Court to vacate a judgment by default, as we have seen, regularly rendered?

It has been earnestly contended that the ruling of an inferior Court upon a motion to vacate a judgment by default, made after term, is not subject to review or appeal, and there are authorities to that effect. See note to *Carlisle v. Wilkinson et ux.*, 12 Ind. 91. The point was not decided in that case, and need not be in this, because this does not present so plain a case of abuse of discretion as to require the interpo-

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sition of the Court, conceding it to have the power of interposition, which this Court has, in other cases, assumed to exercise. Here a judgment had been obtained in 1858, when *Mrs. Symmes* was sane. Six months afterwards that judgment was opened. A demurrer was filed to the cause of action. The Supreme Court decided the cause of action valid. The party neglects to further appear and resist a judgment. A judgment is regularly rendered against him. Six months afterwards he again comes in and asks to have it vacated, on what are claimed to be irregularities in practice in obtaining it, without denying, in the affidavit filed by an agent, that the cause of action on which the judgment rests is valid. We think a case is not made for setting aside the judgment. The circumstances of each case may influence the discretion of the Court. *Frazier v. Williams*, 18 Ind. 416.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

McDonald & Porter, for the appellant.

D. S. Major and McDonald & Roache, for the appellee.

BARNABY v. THE STATE.

FALLS PILOTS—STATUTES CONSTRUED.—The law of *Indiana*, “regulating the licensing of pilots at the Falls of the *Ohio*,” &c., is valid, at least so far as commercial intercourse may be carried on between the parts of said State named in said act, by citizens of said State. 1 G. & H. 473.

APPEAL from the *Clark Common Pleas*.

HANNA, J.—The appellant was prosecuted for a violation of the law of the State “regulating the licensing of pilots at

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the Falls of the *Ohio* river." 1 G. & H. 478. By that act, the Governor of the State appoints the pilots, who execute bonds, payable to the State, in the sum of 5,000 dollars, to be approved by the Clerk of the Circuit Court of *Clarke* county, conditioned, &c. The penalty attached to a violation of the law, by a person not authorized to pilot, is a fine of 20 dollars, for the use of common schools. It is further provided, that any owner or navigator of a boat, ascending or descending the river, may navigate said falls at his own risk.

The record before us shows, that, in the case at bar, upon the trial, "the defendant admitted in open Court, that, on the 27th day of *March*, 1862, at *Clarke* county, *Indiana*, he conducted and piloted a pair of flat-boats, loaded with coal, over the Falls of the *Ohio* river, for hire; that said boats were the property of some person, whose name is unknown, and were not the property of, nor was the said defendant the navigator of said flat-boats." He then produced, and gave in evidence, a certificate, dated *May* 2d, 1861, of certain inspectors of the district of *Louisville*, authorizing him to act, for one year, as "a pilot of a steamer on the *Ohio* river, from *Utica* to *New Albany, Indiana*, and the Falls of the *Ohio* river, at all stages of water of said Falls, more than the steamer he may be piloting shall draw." He also produced, &c., evidence of the fact, that, before one of said inspectors, he had taken an oath as such pilot; and that he had procured said certificate, and taken said oath under the act of Congress of *August* 30th, 1852, entitled, "an act to provide for the better security of the lives of passengers propelled in whole or in part by steamers, and for other purposes."

The defendant was fined, and, a new trial being refused, he prosecutes this appeal.

It is conceded, that, previous to the taking effect of said act of Congress of the 30th of *August*, 1852, the conviction would have been correct, but it is insisted that said act super-

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seded or annulled the legislation of the State upon that subject. In other words, that the regulation of pilots and pilotage may be exclusively controlled by the Federal Government, whenever it is thought necessary to exercise the power; and the enactment of said statute was an exercise of said power. On the other hand, it is urged, that, whatever may be the powers and rights of the Federal Government upon such subject, it is not in exclusion of the right of each State to pass certain laws, in relation thereto, affecting those within the jurisdiction thereof, and that this is one of the exceptions. The exclusive control is claimed to be in the General Government, under the third clause of the eighth section of the first article of the Constitution of the *United States*, to-wit: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the *Indian tribes*." Upon this, it is argued, that pilots, and laws regulating their appointment, conduct, and fees, are necessary to commerce, and, therefore, incident to the power, and within the grant, of exclusive control given to the Congress.

In the case at bar, it may, for the sake of the argument, be conceded, that Congress not only possesses the power, but the exclusive right, to regulate commerce among the several States, including the pilotage of vessels engaged in said commerce; and still the facts, so far as the record shows them, do not make a case falling strictly within the principle of the points thus conceded, because not involved. And why? The ninth amendment to the Constitution is as follows: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people," and tenth: "The powers not delegated to the *United States* by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power conferred upon Congress to regulate commerce, it will not, we suppose, in view of these provisions, be conten-

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ded, give jurisdiction over the navigable waters of a State, except as regards intercourse with other States of the Union, or with a foreign country. It would follow that the State law in question is valid, so far as commercial intercourse may be carried on between the parts of said State by the citizens thereof. Beyond this proposition, it is not necessary to go in deciding this case. It is not necessary, therefore, to attempt to clearly define the boundary line, if it can be done, between the commercial powers of the General Government under the Constitution, and the municipal and reserved powers of a State under the same instrument, and inherently possessed in reference to the same subject, or matters supposed to be incident thereto.

The record does not, strictly speaking, show that all the evidence given in the cause is before us; so far as it is disclosed, the owner of the boats was unknown. His place of departure and destination are not stated. The license, under which it was sought to justify, attempted to authorize the defendant to navigate steamers between two points, within the jurisdiction of this State. As before stated, it not appearing but that the boats that were piloted were running from point to point in *Indiana*, by a citizen thereof, it will not be necessary for us to express any opinion upon the question, whether Congress possesses any power to regulate commerce between said points named in said license, among the citizens of said State, or to exercise control in any matter connected with said commerce. *Cooley v. The Wardens*, 12 How. 299. See, also *Smith v. Tumer*, 7 How. 283, and the other passenger cases and authorities therein cited, and referred to.

Per Curiam.—The judgment is affirmed, with costs.

Thomas L. Smith, *M. C. Kerr*, and *John F. Read*, for the appellant.

Oscar B. Hord, Attorney General, and *R. Crawford*, for the State.

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MENI *et al.* v. RATHBONE *et al.*

NOTICE—ADVERSE POSSESSION.—Where, at the time an interest is acquired in real estate by one person, it is in the actual possession and use of another, under a claim of title, the person acquiring such interest should take notice thereof, and make inquiry.

NOTICE—REGISTRY.—The record of a conveyance, which was not recorded within the period prescribed by law, but was recorded thereafter, would constitute notice to all purchasers after the conveyance was so placed upon the record.

LANDLORD AND TENANT—LEASE.—The right of a landlord to re-enter, for breach of a condition subsequent, is not viewed with favor in the law, and, where he claims a forfeiture, he must show that he has done everything required on his part to perfect such right of re-entry.

SAME—LEASE—CONDITION.—Where a lease is conditioned that, "if default shall be made in any of the covenants therein contained on the part of the lessee, then such lease shall be deemed forfeited, and it shall be lawful for the lessor to re-enter said premises and remove all persons therefrom," and one of the covenants on the part of the lessee requires him to pay all taxes assessed against the premises, and he fails to pay the same, the lessor can not take advantage of the breach of such covenant to forfeit the lease without first demanding or requesting the lessee to pay such taxes.

PLEADING—ALIEN ENEMY.—An answer, which avers that the defendant is informed and believes the plaintiff has been and now is engaged in, inciting, aiding, and assisting in the rebellion of the so-called *Confederate States* against the *United States* and the Constitution and laws thereof, and has been and now is giving aid and comfort to the so-called *Confederate States*, is defective and demurrable, for not stating more specifically the particular acts of rebellion which the plaintiff has committed.

WITNESS—HUSBAND AND WIFE.—As to the admissibility of the testimony of the husband in a case in which he and his wife are both parties, and she claims an interest in the subject matter in contro-

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versy, under a given state of the pleadings and evidence, the reader is referred to the latter part of the opinion.

APPEAL from the *Vanderburgh* Circuit Court.

HANNA, J.—Action by the appellants against *Rathbone* as execution plaintiff, and *Gavitt* as sheriff, to enjoin the sale of a lot, or any interest therein, in the city of *Evansville*, as the property of *John M. App*.

The complaint alleges that the fee simple of the lot is in *John Wise*, that said *App* had no interest therein, and that the plaintiffs by virtue of a lease, of which a copy is set out, are owners of an unexpired term in said lot, and are in possession thereof.

Rathbone and *Gavitt* answer, showing an outstanding conflicting term in *Mary App*, under a lease which is set out and alleging in substance that *Mary App* held the term under the lease in trust for *John M. App*, her husband, who fraudulently procured the same to be made to her to prevent the collection of *Rathbone's* judgment; that *App* went into possession of the premises and built houses thereon, and remained in possession of the same, and that the lease to the plaintiffs was not only made while the term in *Mary App* was subsisting, but made by the fraudulent procurement of *App*, and that therefore the interest of *App* subsisting in the term created by the lease from *Wise* to *Mary App* was subject to sale on *Rathbone's* execution.

Prayer that *Wise* and *App* and his wife be made parties and that the property be subjected to sale, &c.

Upon the filing of the answer, *Wise* and *App* and wife were made defendants.

A demurrer to the answer was overruled, whereupon the plaintiffs filed a reply in one paragraph to which a demurrer was sustained, and upon leave they filed an additional reply, in substance the same as the first, both attempting to set up

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a forfeiture of the lease to *Mary App*, for non-payment of rent and taxes; but the Court also sustained a demurrer to the additional reply. At this stage of the proceedings, *App* and wife and *Wise* appeared and answered, but their answer was afterwards withdrawn, and *App* filed a separate answer to the answer of *Rathbone* and *Gavitt*, to which a demurrer was sustained. The death of *Gavitt* was suggested, and judgment rendered upon demurrer against *John M. App*, and by default against *Wise* and *Mary App*. The plaintiffs filed a reply in denial of the answer of *Rathbone* upon which a jury trial was had, resulting in a verdict for the said defendant, upon which, over a motion for a new trial, the Court rendered judgment. The assignments of error which are insisted upon are as follows:

1. Overruling the demurrer to the answer of *Rathbone* and *Gavitt*.
2. Sustaining the demurrer to the reply.
3. Sustaining the demurrer to the additional reply.
4. Sustaining the demurrer to the answer of *App*.
5. Excluding the testimony of *App*.
6. Giving the instruction asked by *Rathbone*.

The answer of *Rathbone* and *Gavitt* contained some matters in the way of cross petition, to the effect that *App* was the owner of a certain interest in said lot; that the same was fraudulently held in the name of his wife; praying that new parties be made and the lease to plaintiffs set aside as fraudulent, &c.

It is urged that the demurrer ought to have been sustained to this answer, because it does not sufficiently show that all the parties had such notice as would affect them with the fraud charged upon *App*, and because the lease from *Wise* to *Mary App*, although executed on the 20th day of *August*, 1856, was not recorded until the 16th day of *May*, 1857.

It is averred in said answer, that the contract of leasing

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was made by *App* and *Wise*, and that, to hinder and delay, &c., creditors, said *App* caused the lease to be executed to his wife; that the lot was vacant; that he took possession immediately, and in the years 1856, 1857, 1858, and 1859, erected and completed improvements in the way of sundry buildings and tenements, of the value of 3,000 dollars, and of the annual rental value of 600 dollars, which he has heretofore received; that said lease and improvements belong to said *John M. App*; that the judgment being older than the lease is prior lien thereon.

The lease from *Wise* to *Mary App* was for the term of 10 years, and the yearly rent reserved was 75 dollars, for the vacant lot. The lease from *Wise* to plaintiffs was for 6 years and 3 months, at the same rate. It is charged in the answer, that this latter lease was made by the procurement of *John M. App*, to cheat, &c., said *Rathbone*, and is fraudulent.

It appears to us that, *prima facie*, the facts alleged are sufficient to put all parties upon inquiry, if not full notice. The judgment against *App* was older than the first lease; the property was possessed and improved by said judgment defendant, and the rents received by him, for 3 years and 9 months; the exact balance of the term was let by *Wise* to plaintiffs at the same rate the vacant lot was let, although it had been improved and would rent as shown.

Neither the complaint nor the answer avers directly who was in possession of the said property, at the time the second lease was executed; but the answer does aver that *John M. App* had taken possession under the first lease; made improvements and received rents. If there was any inference about the matter, perhaps, it would be that he was still in possession. If so, the plaintiffs should have taken notice thereof, and made inquiry.

The appellants insist that the lease to *Mrs. App*, not having been recorded in proper time, is not notice for any pur-

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pose to any person. Section 11, page 233, 1 Revised Statutes of 1852, enacts, "that no conveyance, &c., and no lease for more than 8 years, shall be valid and effectual against any person other than the grantor, his heirs and devisees and persons having notice thereof, unless it is made by a deed recorded within the time and in a manner provided in this act." Section 16, of the same act, provides that every conveyance, lease for more than 8 years, &c., shall be recorded in the recorder's office of the county where the lands conveyed shall be situated, and, if not so recorded within 90 days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser or mortgagee in good faith for a valuable consideration.

It will be observed that section 11 quoted, declares that no lease, &c., shall be valid, &c., against any person other than * * "persons having notice thereof," unless it is made by a deed and recorded, &c. And section 16 provides that, if not so recorded, they shall be fraudulent, &c., as against subsequent purchasers, &c., in good faith, for a valuable consideration.

The substance of this, it appears to us, is that an unrecorded deed is inoperative as against a subsequent purchaser in good faith, &c., for a valuable consideration without notice. What are our registry acts for? To give notice of existing titles and incumbrances. If the construction insisted upon by the appellants, is correct, then a deed, &c., should not go upon the records, unless placed there within the time designated by the statute. For it could be no notice to one who should purchase, even after it was so recorded. This construction we can not adopt; we think a man could not be considered as standing in the position of a purchaser in good faith, who should buy and take title in view of a recorded deed of an already outstanding title; but that he would be buying with notice. That is, that the record would be notice to subse-

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quent purchasers. We are not now considering the effect of a purchase, after the expiration of the 90 days and before the deed was placed upon the records; but of one made after it was so recorded. And therefore the whole question is whether such record is any notice, or rather is it sufficient notice, or should actual notice be given, of said outstanding title, under said 11th section, to make it effectual? We are of opinion that such record is notice to purchasers who may take title after the same is made.

The second error assigned is the sustaining the defendants' demurrer to the plaintiffs' reply; but, as the questions arising on this assignment are similar to those arising on the third error assigned, which is the sustaining defendants' demurrer to additional reply of the plaintiffs, it is proposed to consider both together.

The reply denies all the imputation of fraud charged in the answer, and then sets up that the leased premises were within the corporate limits of the city of *Evansville*, and that *Mrs. App* failed to pay the rent reserved in the lease for the years 1858 and 1859, and failed to pay the taxes for the years 1858 and 1859, assessed on the lot by the corporate authorities of *Evansville*, whereby the lease, by its terms, became forfeited, and, by reason thereof, the defendant, *Wise*, afterwards entered upon the premises, and then and there demanded payment of said rent and taxes of the said *Mary App*, which were not paid, whereupon *Wise* repossessed himself of the premises, by taking actual possession thereof, and made to the plaintiffs the lease under which they claim.

The additional reply of the plaintiffs also denies all the charges of fraud as to them, in the defendants' answer, and avers that the junior lease, from *Wise* to the plaintiffs, was made in good faith, and at their request, and without the procurement of *John M. App*; that it was made after a forfeiture, by *Mrs. App*, of her lease, and after *Wise* had again

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repossessed himself of the premises, and that the plaintiffs took their lease from *Wise* while he was in the actual possession of the premises, and without any intention on their part to cheat or defraud the said *Rathbone*; that on the 20th day of *August*, 1856, *Mary App*, wife of the said *John M. App*, leased the premises from the said *John Wise*, (a copy of which lease is filed with the answer); that there is in said lease the following covenant, to-wit: "and it is agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then this lease shall be deemed forfeited, and it shall be lawful for the said party of the first part to re-enter said premises, and remove all persons therefrom;" that said *Mary App* failed, neglected, and refused to pay the rent due the said *Wise* on said premises, and which accrued from the 20th day of *February*, 1859, to the 20th day of *May*, 1860, amounting to 92 dollars and sixty-five cents; that on the said 20th day of *May*, 1860, said *Wise* went on the said premises, and at the front door of the dwelling house, situated on said premises, in which said dwelling house the said *John M. App* and his wife then resided, and then and there demanded payment of the rent then due to him on said lease from the said *Mary App*, and payment thereof was then and there refused, and neither the said *Mary App*, nor any other person for her, paid said rent, or any part thereof. And the plaintiffs further say, that, by the terms of said lease, the said *Mary App* covenanted and agreed to pay and discharge all taxes and assessments of any kind and description during the whole of said tenancy; that the premises are situated in *Evansville*, within the corporate limits of that city; that for the years 1858 and 1859, to-wit: on the — day of — of each year, there was, by the proper authorities of the city of *Evansville*, a large amount of taxes assessed and charged upon said property, to-wit: the sum of 100 dollars; that neither the said *Mary App*, nor any other person

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for her, paid said taxes, and thereupon the said property, in pursuance of the statute in such case made and provided, was, by the officers of said city, according to law, for the payment of said taxes, sold to *Robert Early* and *Thomas E. Garvin*, who, on the said 20th day of *May*, 1860, had and held a certificate of purchase from the treasurer of said city for said premises; that on the same day, the said *Wise* went to the said *Mary App*, at her residence on said premises, and then and there requested her to pay off and discharge said taxes, which she then and there failed, refused and neglected to do, and thereupon the said *Wise* demanded possession of said premises, and then and there, with the consent of the said *Mary App*, and *John M. App*, her husband, took actual possession of said premises, and then and there, in the presence of said *App* and his wife, in good faith, leased the said premises to the plaintiffs, as stated in the complaint, and thereupon the plaintiffs took actual possession of the premises under their said lease, and ever since have been, and now are, in the actual possession of said premises, and that, so the plaintiffs say, the said *John M. App* has no interest in said premises.

The appellants insist that the demurrers to the reply and to the additional reply should both have been overruled.

The ground upon which the demurrer to these replies was rested is, that, to be able to avail himself of the somewhat harsh terms of this forfeiture clause, the land sold should be in a condition to show that he had strictly performed all the technical prerequisites necessary to fix such forfeiture, and, it is contended, that these replies do not show such acts upon the part of the said *Wise*.

It is conceded, in appellants' brief, that, as to the rent, the replies are (neither of them) specific enough, in the averments as to him and place of demand thereof. But it is zealously contended, that, in regard to the taxes and assessments, the replies are good; and quite a lengthy argument is presented

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to controvert the doctrine and conclusions of the Courts, in the cases of *Johnson v. Harrison*, 17 Johns. R. 66; *Bowman v. Foote*, Am. L. Reg. for April, 1862, p. 352; *Merrifield v. Cobleigh*, 4 Cush. 178.

The right of a landlord to re-enter, for breach of a condition subsequent, is not viewed with favor in the law; and where he claims that a forfeiture has occurred, and his right attacked, it devolves upon him to show that he has done everything that was required upon his part to perfect such right of re-entry, rather than resort to an action for damages for a breach of such covenants. It is urged, that by the clause of the lease quoted, the right of *Wise* to re-enter, upon the failure of the lessee to pay taxes, is secured; and that without any previous act upon his part; that therefore there was no affirmative act, precedent to this act of re-entry, necessary upon the part of said *Wise*—such as demand that the taxes should be paid, or notice that he would re-enter, if they were not so paid.

In the form and order in which the reply set up the failure to pay the taxes, and the sale of the premises therefor, it would appear that the request made by *Wise* of *Mary App*, to pay said taxes, was made on the same day, but subsequent to said sale. If such a demand or request was necessary, it was not made of the right person. We are of opinion that such a request was necessary. Some difficulty was presented in considering the averment that *Wise*, on the day of the sale for taxes, took actual possession of the premises, with the consent of *App* and his wife, and, in their presence, leased them to the plaintiffs.

It appears to us, that, as the answer showed that the judgment, upon which the execution issued, was before that time existing against *App*, and avers facts, which, in connection with those set forth in the complaint, showed that said judg-

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ment was then a lien upon the same as *App's* property, he could not thus divest that lien.

The next point arises upon the ruling of the Court in sustaining a demurrer to the separate answer of the defendant, *App*. As the answer is lengthy, and the substance is stated in the appellants' brief, we extract that statement, together with the reference, &c., to the act of Congress:

App's answer admits the rendition of the judgment in favor of *Rathbone*, on the 9th day of *March*, 1855, but says it was rendered for the use of *T. C. Twitchell & Co.*; that said firm consisted of *Safronas Twitchell*, *Timothy C. Twitchell* and *Elisha H. Fairchilds*; that the said *Twitchells* and *Fairchilds* are now, and were at the time of the rendition of said judgment, and ever since have been, residents of the city of *New Orleans*, in the State of *Louisiana*, and are now, and ever have been, the sole owners of said judgment, and the real parties in interest in said claim, upon which said judgment was obtained; that the said *Rathbone*, whose name appears in said judgment, was merely a trustee for said *Twitchell & Co.*, and had not, and has not now, any interest in said judgment; and that the said *Twitchells* and *Fairchilds* have been, and are now, engaged in, and inciting, aiding and assisting in the rebellion of the so-called *Confederate States* against the *United States*, and the Constitution and laws thereof, and have been, and are now, giving aid and comfort to the so-called *Confederate States*; and, therefore, the said *App* says that the said *Twitchells* and *Fairchilds* should not be permitted to have and collect from him the amount due on said judgment; wherefore he prays that the said *Timothy C. Twitchell* and *Safronas Twitchell*, and *Elisha H. Fairchilds*, may be made parties to this suit, and that they may be restrained, enjoined, and prohibited, from further prosecuting said claim against him in any way, or in any way attempting to collect the same, and for other proper relief.

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This plea is based on the act of Congress of July 17, 1862, entitled, "an act to suppress insurrection, and to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The 6th and 7th sections of this act, it is urged, confiscate this judgment, and authorize the pleading of the rebellious conduct of the owners of the judgment in bar of any suit brought for the possession or use of the property, or effects liable to confiscation; and that the 7th section enacts, that it shall be sufficient for the person from whom the recovery is sought, to allege and prove that his adversary is one of the persons described in that section. The answer shows that *Rathbone* is the mere trustee for *Twitchell & Co.*, and, as such, is seeking to make the money. The answer of *App* is verified by affidavit.

Previous to filing this answer, *App* had filed another answer, the character of which is not shown, but had withdrawn the same. Whether the answer filed in the second place is in the nature of an answer in abatement, and whether, if so, it came too late in this case, we shall not discuss, as it appears to us there is another point upon which it is clearly bad. Said defendant avers "that he is informed and believes the said *Twitchell, &c.*, are now, and for a long time have been, engaged in and inciting, aiding and assisting in the rebellion of the so-called, &c., and have been and are now giving aid and comfort to the so-called *Confederate States*."

The pleader was here dealing in mere generalities, and appears to have come to the conclusion that certain acts had brought the said persons within the purview of the said statutes; but what those acts were, he does not aver. In many instances, it is the province of the Court, not the party nor his attorney, to determine whether the acts which another has performed fall within the description of an offence in a statute. We think this is one of the instances.

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There is no point made here as to the validity of the act, of which advantage is thus sought.

The next question is made on the ruling of the Court in excluding the evidence of *John M. App*. The decision appears to have been based upon the ground that he was the husband of *Mary App*, and that her interest as lessee was involved in and was the subject matter of the suit. The issue being tried was between the plaintiffs and *Rathbone*. Said plaintiffs, in substance, averred that the title to a certain interest in said property was in them and the fee in *Wise*. *Rathbone* averred that there was a superior outstanding title for a term of years in *Mrs. App* as trustee for *App*, and that the fee was in *Wise*. To this the plaintiffs filed a denial. Had *Mary App* such an interest in the determination of that issue as should have excluded her husband from testifying? *App* and wife, by failing to answer, had admitted the truth of the matters charged in the answer of *Rathbone*. But we do not suppose this legal admission, for the purpose of the suit, could deprive either of the remaining adversary parties to the action from the benefit of this evidence, if they were otherwise competent.

The appellee contends that the question of the competency of *App* as a witness is wholly immaterial, because there was no issue to which his testimony could have been applicable.

An inquiry into this question will also settle that as to the correctness of the instruction given, which was as follows:

"That the only material issue submitted to the jury is, whether the lease alleged to have been made by *Wise* to *Mrs. App* was made, executed and recorded according to law, and that the record of the lease read in evidence was sufficient proof of that fact, and that if the jury believe the lease was so executed and recorded, they should find for the defendant."

This was the only instruction asked by the defendant, or given by the Court; other instructions were asked by the

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plaintiffs and refused, touching the questions of fraud raised by the answer of *Rathbone*, and put in issue by the denial of plaintiffs.

The lease to *Mary App* having been made a part of the answer to *Rathbone*, and its execution, &c., not having been denied under oath, this instruction assumes that *Rathbone* might rely upon that to prove a title superior to the plaintiffs, and that such proof alone would defeat them. Is the position as a legal proposition correct, and if so, does *Rathbone's* record enable him to avail himself thereof?

One view is that if *App*, the execution defendant, had no interest, a levy and sale would convey nothing; but as the record was made as between *Rathbone*, *Wise* and the said *App* and wife, it would appear he had such interest.

The other view is, that if the title of plaintiffs is not a superior title, they can not maintain their suit and enjoin said execution plaintiff. They set up such title. In that the complaint is controverted by that part of the answer showing a conflicting title in a third person, but accompanied with the averment that it is held for the execution defendant. The controversy is, by the instruction, reduced to the simple question, whether *Rathbone* could abandon all other averments but those setting up a superior conflicting title in a third person, and rely upon that to defeat the action.

This is a statement of arguments in the briefs upon this point, and may or may not touch the grounds or reasons upon which the Court below based the instruction quoted.

It appears to us, in the absence of the evidence, and in view of the issue being tried, that the instruction of the Court was right for another reason, namely, that, by the facts shown in said pleadings, the lease was the property of *App*, and not that of his wife. A lease for years is a chattel real, and being less than a freehold, wanting duration as to time, is considered as personal estate or property; Blacks. Com. 2, B. 386; and

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under our statute is not included under the word "land," or the phrases "real estate," or "real property;" 2 G. & H. 386; but is included in the phrase "personal property;" *id.*; that is, "chattels" are so included, without distinction being made between real and personal chattels. As by the common law, personal property acquired during coverture became the property of the husband, upon his reducing it possession; and as such act of possession and ownership are alleged in the answer, in the case at bar, the said chattel became and was the property of the husband, notwithstanding it was held nominally in the name of the wife. It was therefore subject to his debts, and the judgment against him was, by statute, a lien upon the said "chattel real." 2 G. & H. 264. The statute of 1852, 1 G. & H. 374, in reference to lands of married women, and that of 1853-57, in regard to the personal property of a wife, do not make any change of the said rule as to this property; because it was, so far as appears, acquired during coverture, and in a mode not provided for by said statute; that is, it did not come by "devise, descent or gift," and therefore the husband's rights therein remained as at common law. *Cox's Adm'r v. Wood*, 20 Ind. 59. As the title, attempted to be vested in the wife, thus enured to the benefit of the husband and became his, that part of the answer alleging that the execution of the lease to her was in fraud, &c., was, under the circumstances, surplusage, and could well be abandoned.

Per Curiam.—The judgment is affirmed, with costs.

Conrad Baker, Charles E. Marsh and Thomas E. Garvin, for the appellants.

Asa Iglehart and A. L. Robinson, for the appellees.

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COSTS—PRACTICE—PRESUMPTION.—In an action to recover damages for a nuisance in erecting a mill dam, and to abate the same, where the plaintiff alleged in his complaint that he was the owner in fee and in possession of the land, proof of possession alone would entitle him to recover damages, and, where, in such action, he recovered judgment for 1 dollar damages and the like amount of costs, and failed to obtain an order for the abatement of the nuisance, or show himself entitled thereto, this Court will presume in favor of the correctness of the judgment below, and that the title to the premises did not come in question.

APPEAL from the *Franklin* Circuit Court.

WORDEN, J.—This was an action by *Daniel Barber*, the appellant, against *John Barber*, to recover damages for, and to abate, a nuisance.

The complaint alleges that the plaintiff was the owner in fee, and possessed of certain land, describing it, and that the defendant raised a certain mill dam and thereby caused the water to flow back upon the premises of the plaintiff. Prayer for damages; that the defendant be required to remove the dam; and for other proper relief.

The defendant answered by general denial; setting up also other matters not necessary to be here noticed. Trial by jury; verdict for the plaintiff for one dollar in damages, on which verdict the Court rendered judgment for the plaintiff for the damages thus assessed, and for one dollar of his costs. The plaintiff claimed full costs; and whether he was entitled to them is the only question presented by the record.

The statute provides that "in all actions for damages solely, not arising out of contract, if the plaintiff do not recover 5 dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false imprison-

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ment, and where the title to real estate comes in question." 2 G. & H. 227.

But the plaintiff insists that the case does not come within the provision above quoted, for two reasons: 1. That it is not an action for damages solely, but also for an abatement of the nuisance; and—2. That the title to real estate came in question; wherefore he was entitled to full costs.

In reference to the first point, we may observe that the plaintiff did not ask for any judgment of abatement, further than the prayer of his complaint; nor is the evidence before us whereby we could determine whether he made out such a case as entitled him to have the dam abated. We think, the plaintiff not having procured an order for an abatement, and not having, so far as we are informed by the record, shown himself entitled to it, the case should be treated as one "for damages solely."

If the action was brought for something more than damages, it failed for anything beyond; and in respect to matter for which the action failed, there can be no reasonable pretence that the plaintiff should recover costs.

This brings us to the remaining question. Did the title to real estate come in question? As before observed, the evidence is not before us, and we must presume in favor of the ruling of the Court below, that the title did not come in question, if, under the pleadings, the plaintiff could have recovered without proving his title. In the complaint it is not only alleged that the plaintiff was the owner of the land in fee, but also that he was possessed thereof. Proof of possession was sufficient to maintain the action. See note (2) to the case of *Conner v. New Albany*, 1 Blackf. pp. 89, 90, 2 ed., where it is said that "actual possession is sufficient on which to ground an action as against a wrong-doer; for he who commits a trespass upon the possession of another, being

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himself a wrong-doer, has no right to put the other party upon the proof of title."

Where the plaintiff is not in actual possession, he would undoubtedly be required to prove title, which would draw after it such a constructive possession as would enable him to maintain an action. *Raub v. Heath*, 8 Blackf. 575. If in this case the plaintiff had alleged his title only, without alleging possession, it is difficult to see how he could have recovered without proving that title, in view of the rule that the allegations and the proofs must correspond. But having alleged a possession as well as title, proof of possession alone authorized a recovery, without proof of title; hence we can by no means say that the title to real estate came in question. *Bennett v. Coffin*, 4 Ind. 219, is in point. There the plaintiff, having recovered less than 5 dollars in an action to recover damages caused by a mill dam, recovered full costs. This Court, in the absence of the evidence, presumed, in favor of the ruling, that the title did come in question. See also *Dodd v. Sheeks*, 5 Blackf. 592. The cases of *Rogers v. Perdue*, 7 Blackf. 302; and *Harvey v. Dakin*, 12 Ind. 481, may also be cited as in point, that it will be presumed in favor of the ruling of the Court below, where the record admits of such presumption, that the title to real estate did not come in question.

In the case of *Cromwell v. Lowe*, 14 Ind. 286, the plaintiff offered his title deeds, and the Court instructed the jury that he must show, by a preponderance of evidence that he was the owner of the land, &c.; hence it was held that the title was in issue. The case of *Dixon v. Hill*, 8 Ind. 147, which is relied upon by counsel for the appellant, is not in point, for there the plaintiff never had possession of the land; on the contrary it was averred that at the time the land was entered and ever since, the defendant was in possession. It was very properly held that the title was put in issue by the answer in

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denial. The plaintiff could not have recovered at all without proving title.

As the plaintiff herein might have recovered by showing possession of the land as alleged, without proving title, and as the evidence is not before us, we will presume that the title did not come in question, and affirm the judgment below.

Per Curiam.—The judgment is affirmed, with costs.

George Holland and Charles C. Binkley, for the appellant.

John M. Johnston, for the appellee.

STEVENSON. CAMPBELL.

PARTIES—FORECLOSURE.—The mortgagor is not a necessary party in an action to foreclose a mortgage, where he had sold the equity of redemption before the commencement of the foreclosure suit.

SAME.—But, if the mortgagee desired to recover a personal judgment against the mortgagor for any deficiency after the sale of the mortgaged property, then he would be a necessary party.

PLEADING.—A complaint in foreclosure is good, which avers, against the owner of the equity of redemption, that the mortgagor is indebted to the plaintiff by note in a specified sum, which is due and unpaid, and that the mortgagor and his wife executed a mortgage to secure it, and that the mortgage was not recorded, and that the defendant purchased the equity of redemption with actual notice of the mortgage, the mortgage and notes being made parts of the complaint.

PRACTICE.—It is not error to strike out a paragraph of an answer which renders necessary no other proof than was already made necessary by the previous filing of the general denial.

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APPEAL from the *Fulton* Common Pleas.

WORDEN, J.—Complaint by *Campbell* against *Jesse Klinger* and his wife, and also against *Stevens*, the appellant. It charges that *Jesse Klinger* executed to the plaintiff a promissory note, which was over due when the suit was commenced, and that he and his wife executed to the plaintiff a mortgage on certain property therein described to secure the payment of the note; and copies of the note and mortgage are duly set out. It further charges that the mortgage was not recorded, but that *Stevens* purchased the land of *Klinger* after the execution of the mortgage, having notice thereof, and that he claims to be the owner of the land.

Stevens demurred to the complaint, because it did not state facts sufficient, &c. The demurrer was overruled. He then filed an answer denying every allegation in the complaint relating to him. He afterwards, on leave granted, withdrew his answer, and again demurred to the complaint, on the ground that it did not state facts sufficient, &c. The demurrer was again overruled and he excepted. He then refiled his former answer, and a second paragraph alleging that he purchased the land of *Klinger* on the 1st of *January*, 1860, (which was after the mortgage was executed,) without any notice of the existence of the mortgage, which had not been recorded, &c. The second paragraph, on the plaintiff's motion, was stricken out, and *Stevens* excepted. The issue thus formed was tried by the Court. Finding and judgment for the plaintiff, the Court ordering the overplus on the sale of the land, after paying the plaintiff's debt and costs, to be paid to *Stevens*.

Stevens alone appeals, and assigns but two errors: 1. The overruling of his demurrer to the complaint; and—2. The rejection of the second paragraph of his answer.

The demurrer was correctly overruled, the complaint being sufficient. It charged against *Klinger* and wife the making

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of the mortgage, and that *Stevens* purchased the land of *Klinger* with notice. But it is urged here that *Klinger* and wife were not parties to the suit, wherefore the demurrer of *Stevens* should have been sustained. The complaint was against *Klinger* and wife as well as *Stevens*; and the fact—if such were the fact—that at the time the demurrer was filed and passed upon, *Klinger* and wife had not been brought into Court, was no reason why the demurrer of *Stevens* should have been sustained. The record contains no process against *Klinger* and wife, and it is not clear that they appeared. But *Stevens*, having purchased the equity of redemption, *Klinger* and wife were not necessary parties to a bill to foreclose the mortgage. Story Eq. Plead. sec. 197. If the plaintiff sought relief against *Klinger* and wife, beyond the sale of the premises, as a judgment against *Klinger* for any deficit after the sale of the premises, or to make the judgment of foreclosure conclusive against the wife in respect to her interest in the land, in case she should survive her husband, they, for such purposes, were necessary parties. These, however, are matters in which *Stevens* had no concern. *Klinger* and wife are not complaining of anything done against them.

The striking out of the second paragraph of *Stevens'* answer did him no harm, as, under the general denial, which was in, the plaintiff, having admitted that *Stevens* had bought the land of *Klinger*, and that the mortgage was not recorded, and having alleged that *Stevens* had notice of the mortgage, would be bound to prove such notice. The counsel for the appellant argue this point as though the paragraph stricken out was the only one in the record. In this they are mistaken. The record, having once set out the original answer in denial, and which had been withdrawn, informs us that the defendant filed his amended answer in two paragraphs, the first paragraph being the former answer refiled; and the second is then set out.

The State v. Gilbert.

Per Curiam.—The judgment below, as against *Stevens*, is affirmed with costs.

J. Guthrie, F. C. Annabal, and M. R. Smith, for the appellant.

S. Keith, D. D. Pratt, and D. P. Baldwin, for the appellee.

THE STATE v. GILBERT.

CRIMINAL LAW AND PRACTICE.—For a sufficient form of information, for obstructing the execution of criminal process, see the opinion.

APPEAL from the *Jefferson* Common Pleas.

PERKINS, J.—Information against *Gilbert* for obstructing the execution of criminal process. The information alleges that the officer arrested, upon a warrant, one *Franklin*, who was duly charged with larceny; but it alleges, that while making the arrest, *Gilbert*, then and there knowing that the officer had a warrant for *Franklin*, and was endeavoring to arrest him, did assault, beat, abuse, and resist the officer while executing the process.

We think, though the information is informal, it reasonably means that *Gilbert* resisted the officer, while making the arrest, by assaulting, abusing him, &c.; and that this shows an obstruction of process. Our statute expressly provides, that the words of the statute need not be used in criminal pleadings, but that equivalent words will be sufficient. We think the averments in the information show an obstruction, within the meaning of the statute. That the obstruction was not sufficient to prevent the arrest, does not render the obstruction innocent.

Thompson v. Hollingsworth.

Per Curiam.—The judgment below is reversed, with costs.
Oscar B. Hord, Attorney General, and *Solon Russell*, for the State.

ARNOLD v. ARNOLD.

APPEAL from the *Hendricks* Circuit Court.

Per Curiam.—This was an action for a divorce by the appellee against the appellant. Divorce granted. Since the original record was filed, an additional record has been filed in this Court, showing that the Court below subsequently allowed the appellee 800 dollars by way of alimony. We have carefully looked into the evidence, all of which is contained in the record, and are of opinion that it fails to make out such a case as, under our law, entitled the appellee to a divorce; wherefore the judgment will have to be reversed. This reversal will, of course, carry with it a reversal of the judgment for alimony.

The judgment below is reversed, with costs.

Nave & Witherow, for the appellant.

L. M. Campbell, for the appellee.

THOMPSON v. HOLLINGSWORTH.

TRUST MORTGAGE—CONSTRUCTION OF CONTRACT.—The decision herein relates entirely to the construction of a contract, relating to real estate, and can not be briefly stated. See the opinion at length.

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APPEAL from the *Blackford* Circuit Court.

HANNA, J.—In *February*, 1855, the *Ohio, Indiana and Illinois Railroad Company* made an instrument, in writing, to *John Brownlee*, which will be more particularly noticed hereafter.

In *July*, 1856, the appellant, who had, before that time, recovered judgments against said company, took the proper steps to make the same liens upon the real estate of said company in said county.

In *April*, 1857, *Brownlee* conveyed certain lands to the appellee.

In *August*, 1857, the appellant became the purchaser of the same lands at a sheriff's sale, to satisfy his said judgments.

The only question presented is, whether, by the instrument executed by said company, the title to the said lands was vested in *Brownlee* with power to him to convey the same. If the title was so vested, then, it is insisted, there was nothing upon which the judgments could operate as a lien—nothing that the sheriff could sell. If the title was not so vested, then, it is urged, *Brownlee* could convey nothing to said appellee.

The instrument in writing, upon which the authority of *Brownlee* to convey is based, is as follows:

"The *Ohio, Indiana and Illinois Railroad Company*, in the State of *Indiana*, by *John M. Wallace*, their President, do convey and warrant unto *John Brownlee*. (A trustee, appointed by the board of directors of said company to receive and hold in trust, for the benefit and security of the present and future holders of the scrip or treasury warrants of said company, certain real estate belonging to said company, to-wit: &c.) Now, it is expressly understood, that this deed of trust is executed to said trustee to secure the full payment of all scrip or treasury warrants of said company, issued upon the treasury thereof, or hereafter to be issued, amounting to

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20,000 dollars; and that, upon the payment of the said scrip or treasury orders by the said company, this deed of mortgage is to be null and void, and said trustee does hereby reserve to himself the power to sell to scrip holders or others any or all of said lands to redeem the said scrip, and provided the proceeds of such sales be so applied, in fact, to the construction of said road, and in incidental expenses. It is further understood that said lands, or any part of the same, in quantities as deeded to said company, or any less, if desirable by the company, may be subject to entry by such scrip holders from said trustee, at the prices said lands were taken at, &c., and this mortgage shall not be foreclosed under two years from this date."

The facts thus shown appear to be simply, that the company were issuing certain scrip, which it was desirable should not depreciate, but be good in the hands of holders; therefore, its ultimate redemption was to be secured. It is inferable that said scrip was intended to pass from hand to hand. The security was therefore not given to the persons to whom it was issued and delivered, but to *Brownlee*, who is termed a trustee, and holds said security for their benefit. If the scrip had all been made and delivered to one person, and this trust mortgage, as we may term it, had been made and delivered to him also, we can not see but that it would have been a security only; and therefore we have referred to it as a security in the hands of *Brownlee*. The fact that he was selected to receive and hold it for the benefit of others, instead of himself, does not, in this instance, change its character. Even if it was conceded that *Brownlee* had, in a certain contingency, the power to sell said lands, or permit the same to be entered, it would not necessarily follow that the title was in him, or that he could convey the same. He might, as the agent of the company thus selected, bind said company by a contract in regard to said scrip and lands, so that it would be com-

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pelled to make a conveyance in discharge of the same. With this view, certain provisions of the instrument, under which it is claimed *Brownlee* could convey, are reconcilable with other provisions declaring it void upon the redemption of the scrip, and limiting the time at which legal proceedings to foreclose might be resorted to. If the title was transferred to *Brownlee*, what would be the result in reference thereto, of a redemption of said scrip? In such event, the instrument provides that it shall be considered void. He could hold no title on a void title paper, when acting in the capacity here indicated. It appears to us, that the paper to *Brownlee* could have the effect only of creating a lien in favor of the holders of said scrip, which might be resorted to by them or not. If the whole fund thus placed in his hands was not sufficient to pay or redeem all the outstanding orders at any given time, the question, whether each holder would be entitled to a *pro rata* out of said security, or whether it might be all absorbed in the redemption of a part, by a sale of the lands, or permitting an entry thereof, is not before us in the case at bar, and is alluded to only to show an additional reason why we should conclude that the title and the absolute power were not vested in said trustee to dispose of said fund provided to secure said redemptions.

As the appellee did not acquire a title directly from the company, nor take legal steps to avail himself of this security, it follows that he acquired no legal title to said lands. Whether he acquired an equitable title as against said company, we need not decide, and the company is not a party to this suit; nor need we decide whether he acquired any prior equities, as to this land, over other scrip holders. For the same reason, we need intimate no opinion as to the validity of the proceedings in favor of *Thompson*, in the event this lien was out of the way.

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Per Curiam.—The judgment is reversed, with costs. Cause remanded.

H. D. Thompson, Walter March and W. R. Pierce, for the appellant.

J. Brownlee, for the appellee.

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Bad headnote. No Champert

 COQUILLARD'S ADM'R v. BEARSS et al.

PROSECUTION OF CLAIMS AGAINST GOVERNMENT.—A claimant against the government has a clear right to appear, in person or by attorney, before a legislative committee, to openly and fairly present the facts and arguments upon which he relies for recovery.

SAME.—But it is against public policy and unlawful to present such facts and arguments secretly, or to resort to "log rolling," or deceit, or undue means, or bribery, or other corrupting influences, in order to secure desired legislation.

SAME—**CHAMPERTY**—A contract to prosecute a claim against the government, for another person, and pay all expenses, and to receive, as compensation therefor, a certain portion of the amount recovered, if successful, and nothing if not successful, is champertous and wholly void.

APPEAL from the *Miami* Circuit Court.

HANNA, J.—Action by the appellant against the appellees, based upon the following letter:

"Peru, September 29, 1849.

"*Mr. A. Coquillard*—SIR: Your letter of the 13th instant was received several days since, in which you propose making a trial to collect the claims against the *Pottawotamie* Indians allowed by Gen. *Mitchell*. I consulted my brother, *Ephraim Bearss*, and we concluded to offer your twenty-five per cent.

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for collecting on whatever amount you may get the government to assume, or any arrangement that can be made so as to secure to us the remaining three-fourths.

"If you can collect or secure to us our claims as above, you may do so, and this will authorize you to act in the matter for us and in our names, the same as we could were we there ourselves. If you can succeed, twenty-five per cent. will pay you well, and it will not leave much for us. If you don't succeed, we are not to be at any expense.

"If a power of attorney is necessary, we are willing to give you one, but are not willing to pay much out upon uncertainty.

"If you conclude to attend to our claims, please write us and let us know.

Very respectfully,

"D. R. BEARSS,

"EPHRAIM BEARSS,

"Per D. R. Bearss."

"A. Coquillard, South Bend."

The complaint avers that, at the date of the letter the appellees having certain claims against the *United States* Government, growing out of certain transactions with the *Pottawotamie* Indians, amounting to the sum of 998 dollars and 12 cents, which had been allowed by Gen. *Mitchell*, Indian agent, and reported to the Indian Department as just and valid, made the agreement set out, whereby the appellees agreed that, if the decedent would collect and secure said money, they would pay him the sum of twenty-five cents on the dollar on the amount so collected and secured; that the decedent accepted the offer, and proceeded at his own expense to *Washington City*, and employed agents and attorneys to assist him in preparing and laying before the proper officers and committees the evidence of the "plaintiffs" identity and the validity of said claims, and laid out large sums of money

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in relation thereto; and by his care and diligence in the premises secured from the government and caused said sum to be paid to the appellees; that said service was performed about the 1st day of *October*, 1850, by securing the passage by Congress of an act of appropriation for that purpose, and afterwards, to-wit: on the first day of *December*, 1850, by the receipt by the appellees of the sum so appropriated by the said act; that on the 11th day of *November*, 1850, the decedent made a special demand upon the appellees for said commission, which they refused to pay; that to delay the said decedent in the collection of said per centage, the said defendants, after the appropriation by Congress, refused to recognize their contract, and drew the money and appropriated it to their own use; that they drew the same with the intent to unreasonably delay the payment of the same, wherefore the appellant asked that the appellees might be charged with interest from the day of demand, to-wit: *November* 11th, 1850.

The appellant further avers that during said transactions, said decedent was not an attorney or solicitor, nor did he hold any office under the *United States* Government, nor were his services performed before any court of law or equity, either State or Federal; that he acted as a private citizen, and in no other capacity than as said *Bearss'* agent.

To this complaint a demurrer was filed and sustained, which presents the only question in the record.

In the prosecution of claims against the government, before a Legislative body, there are certain things that can be legitimately and properly performed in aid thereof; and certain other things that can not. As in a Court of justice, so in a Legislative committee or assembly, we suppose, a person may, if permitted, appear by himself or attorney to openly and fairly present the facts and arguments upon which he

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relies. *Marshall v. The Baltimore and Ohio Railroad Company*, 16 Howard 337; 2 Pars. on Contracts 361.

But he can not do even this secretly, nor resort to "log rolling," nor to deceit or undue means, nor promises of personal advantage or benefit to members, or by bringing to bear other corrupting influences.

We have carefully examined the writing herein declared on, and the averments in the complaint, and we are not able to perceive that the deceased engaged or undertook to resort to any of the means or appliances that would render his action illegal. The presumption would be that he was employed and engaged to take an honest course in forwarding the interest of his employers.

This would dispose of the case if the defendants had agreed to pay the deceased a fixed sum; but as the agreement was for a part of the claim, the payment of which he was employed to obtain, the question is, whether that invalidated such agreement. It is argued that it did, on the ground that such agreement was champertous, or against public policy.

On the other hand it is urged that, the laws in reference to champerty have relation only to proceedings in courts of justice, and do not apply to legislative action, or the means used to produce the same, or contracts in regard thereto.

We will notice definitions of the term or offence: "Champerty—A bargain with a plaintiff or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law, the champertor undertaking to carry on the suit at his own expense." 1 Bouvier's Law Dict. See also 1 Pick. 416; 4 Litt. 117; 5 John. Ch. R. 44; 7 Port. 488.

"Champerty—A bargain with the plaintiff or defendant in any suit to have part of the land, debt, or other thing sued for, if the party that undertakes it prevails therein; whereupon the champertor is to carry on the party's suit at his own expense." 1 Jacob's Law Dict. See also 1 Inst. 368.

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The definition given by *Blackstone* is in the same language used by *Bouvier*. 3 Comm. 135.

It is possible that as to its general signification a broader definition may be given to the word, in view of its derivations. Webster's Dict.; Bouvier's Dict.; Jacob's Dict. But when used in connection with matters of law or legal proceedings, it would appear to have reference technically to suits, &c., in courts. It would follow that the criminal offence of champerty could not be committed in prosecuting a claim before a legislative body for a part of the sum to be obtained. The question, whether it is so far against public policy as to render the contract void, remains to be examined.

At the time the contract herein was made and the services rendered, we are not aware that there was any statute upon the subject. There was one passed in 1858; 10 Stat. at Large 170; forbidding certain persons therein designated from engaging in the prosecution of claims against the government; but it does not appear that the deceased fell within the prohibition—indeed such fact is negatived by the averments in the complaint. As to statutory enactments, the contract was not illegal. Was it on general principles? It is said in the case cited in 16 Howard, that “public policy and sound morality do imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided.” 334. In the case just cited the contract was not enforced, and it is argued that, “bribes in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence.” In the case the Court cites, *Fuller v. Dame*, 18 Pick. 472; *Hatzfield v. Gulden*, 7 Watts 152; *Clippinger v. Hepbaugh*, 5 Watts and Sergt. 315; *Wood v. McCan*, 6 Dana 366; *Hunt v. Test*, 8 Alabama 719; *Com-*

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monwealth v. Callaghan, 2 Virginia cases 260, and says: "The sum of these cases is, 1. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislation, are void by the policy of the law." *Id.* 366. This summing up of what the Court understood to be the purport of those cases is, as we view it, in terms of approval of the legal position so understood to be declared in those cases. It is true that, in the case then being discussed, the facts showed that the contract was based upon an understanding that undue means were to be resorted to in procuring legislation, and large contingent compensation was dependant upon success. This may have colored the language employed in the opinion, but could not change the principle decided.

In the case at bar there is nothing showing that any undue means were to be used. But it is either right or wrong to agree for compensation contingent upon success in procuring legislative action.

The burden of the argument, in the case cited from the highest court in the nation, it appears to us is, that such agreements are against public policy. This accords with our views of both the morality and legality thereof. It is conceded that legislation was necessary in reference to the claims, payment of which was being sought.

Per Curiam.—The judgment is affirmed, with costs.

D. P. Baldwin, for the appellant.¹

Thomas A. Hendricks and *Oscar B. Hord*, for the appellees.²

(1) The counsel for the appellant argues:

The decision in *Scobey v. Ross*, 13 Ind. 117, does not touch the present case, because champerty applies only to suits pending or about to pend in courts of justice, or the use of their machinery, in consideration of having a share of the subject matter of the litigation. In the case at bar the services contracted for were not to be performed in any Court, State or national. The *United States* can not be sued.

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The only way to enforce a right against it or obtain redress of grievances is by petition and argument, and in no sense can such an application be called a suit. There is none of the machinery of courts about it; no lawyers, no pleadings, no appeals. Champerty is devised to preserve the integrity of the judicial department of the government, and as such is no doubt salutary. But in the legislative it is unknown. There the only contracts that the law sets its hand upon are those designated by the term "lobbying." A man may employ agents and attorneys to produce evidence of the validity of his claims to identify himself and his papers; nay, to work upon the ear of committees by argument and entreaty, and the law will uphold the agreement, and has so done thousands of times. In *England* practice before legislative committees has grown into a recognized profession. In the case at bar it will be noted that the claims in question had been adjudicated upon by the *United States* agent, Gen. *W. B. Mitchell*, and all that remained was to have Congress recognize the same by an appropriation. In the recent case of *Sedgwick v. Stanton*, 4 Kernan N. Y. Rep. 289, this whole subject is thoroughly discussed. That was an agreement to engineer a title through the Board of Canal Commissioners and receive in consideration of such services one-half the land so obtained. The Court draw the line very clearly between applications to the Legislature and applications to its Courts, holding that in the former case a contract for such services would be valid, in the latter champertous by the common, although not by statutory law of that State. We press upon the attention of this Court that discussion, especially as found on pages 291, 292 and 294.

Admitting that the common and statutory law of *England* up to 4 *James I*, prevails in this State, this contract is not champertous by either of those laws.

(a) There are two principal statutes prevailing on this subject, 2 Edw. 1 c 25, and 28 Edw. 1 c 11, both set forth in *Bacon's Abridgement*, title Champerty. The statute, 3 Edw. 1 c 25, contains the words, "in the king's courts," thus expressly excluding the idea that champerty could exist elsewhere; and this has been construed to mean courts of record. 2 *Institutes* 208.

The amending statute, 28 Ed. 1 c 11, (which is the one universally

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cited) contains this clause: "No officer nor any other for to have part of the thing in plea shall take upon himself the business that is in suit, nor upon any such covenant shall give up his right to another." Now these words have a well known and a technical meaning. "In plea" and "in suit" are unmistakable terms, and never used outside of courts of justice. There is another statute, West 2 c 29, that regulates certain officers therein named, as regards champerty and maintenance, but that has no application here, the services being performed by a private individual. 2 Institutes 484.

(b) Common Law—*Blackstone* defines champerty as follows: "A bargain with a plaintiff or defendant to divide the land or other matter sued for between them, if they prevail at law. * * * In one sense of the word it signifies the purchasing of a suit or right of suing; a practice so much abhorred by our law that it is one reason why a chose is not assignable at common law, because no man should purchase any pretence to sue in another's right." 4 Comm. § 135. This has been held to apply to suits in equity also. Moore 665.

Bouvier and *Tomlin*, in their Law Dictionaries, give this definition *verbatim*. We have carefully and critically examined all the decisions within our reach, and those cited in the United States Digest, and do not find a single application of the rule and consequences of champerty, except to cases pending or about to be instituted in Courts of justice, and we are persuaded there are none. And *Sedgwick v. Stanton*, *supra*, seems to us to expressly decide that such contracts are legal. *Parsons*, in his work on Contracts, vol. 2, p. 261: "All those whose interests are to be affected by legislation may both legally and morally, for the protection or advancement of their interest, use all means of persuasion that do not come too near bribery or corruption, but the promise of any personal advantage to a legislator is open to this objection, and therefore void." No rule is better settled than that illegality is never presumed, but must affirmatively appear. Nothing whatever of this kind appears upon the face of this contract, and this Court, as against its terms, can indulge in no presumptions.

(2) The counsel for the appellees argue:

We think a contract of the character shown by the complaint, against public policy and void, because tending to legislative and

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public corruption. *Mr. Coquillard*, in the prosecution of the claim may have done no act, or used any influence inconsistent with the most elevated morality, but such contracts necessarily "lead to the use of improper means and the exercise of undue influence."

This principle has been applied in a variety of cases, in which it has been held that such contracts were void.

1. A contract founded upon a promise and engagement to procure signatures and obtain a pardon from the Governor for one convicted of a criminal offence and sentenced to punishment. *Hartz v. Gulden*, 7 Watts 152; *McGill's Adm'r v. Burnett*, 7 J. J. Marsh, Ky. 640.

2. An agreement to procure a contract for work and labor from the Directors of a railroad company. *Davis v. Seymour*, 1 Bosworth, 88.

3. A contract for compensation to resign the position of physician in a Marine Hospital in favor of the party agreeing to make the compensation. *Eddy v. Capron*, 5 B. I., (1 Ames,) 394.

4. A bargain to use influence in obtaining an office connected with the collection of the revenue. *Hopkins v. Prescott*, 4 Com. Bench R. 518; *Gray v. Hook*, 4 Comstock 449.

5. An agreement to prosecute and superintend, in the capacity of agent or attorney, a private claim before the legislature. *Bryan v. Reynolds*, 5 Wis. R. 200.

6. A contingent compensation to secure the location of a railroad station. *Fuller v. Dame*, 18 Pick. 472.

7. An agreement by a person to use his influence and exertions to procure the passage of a legislative act. *Harris v. Roofs' Ex'rs*, 10 Barb. 489; *Mills v. Mills*, 36 Barb. 474; *Rose v. Truax*, 21 Barb. 361; *Sedgwick v. Staunton*, 4 Kernan, (14 N. Y.,) 289.

Many illustrations of the rule will be found given in the cases cited.

It has been held in a number of cases, that contracts for a contingent compensation for obtaining legislation are void. *Clippenger v. Hepbaugh*, 5 Watts & Serg. 315; *Gil v. Williams*, 12 Lou. Ann. R. 219; *Wood v. McCann*, 6 Dana, Ky., 366; *Marshall v. The Baltimore and Ohio Railroad Co.*, 16 How, U. S. R. 324.

In the case of *Gil v. Williams*, it is said: "The plaintiff in this case can not recover, not because he has resorted to bad means in order to procure the passage of laws in which he had a direct pecun-

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iary interest, for of this there is no proof and no imputation, but because he has made a contingent contract, which, if enforced in this case, might open the door to a practice of corruption and to the use of sinister influences." The Supreme Court of the *United States*, in the case of *Marshall v. The Baltimore and Ohio Railroad Company* present in a strong light the consequences proceeding from such contracts.

"Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce so beneficial a result to himself are "proper means;" and that a share of these profits may have the same effect of quickening the perceptions and warming the zeal of influential or "careless" members in favor of his bill. The use of such means and such agents will have the effect to subject the State Governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector. Speculators in legislation, public and private, a compact corps of venal solicitors, vending their secret influences, will infest the capitol of the Union and of every State, till corruption shall become the normal condition of the body politic, and it will be said of us as of *Rome, omne Romae venale.*"

The case at bar is not one where there has been a mere employment to present evidence to a committee, or make an argument before a committee or a legislative body, but an agreement to proceed to *Washington* and secure congressional legislation, receiving nothing in case of defeat; but should the party be successful he is to receive for compensation one-fourth of the amount secured, and he is to bear the whole expense of the proceeding.

This contract is void for another reason, for maintenance. See Bacon's abridgment, Bouvier's edition, tit. Maintenance. Maintenance was an offence at common law, the statutes merely giving additional penalties. *Peckel v. Watson*, 8 Meeson & Welsby 691.

The case of *Wallis v. The Duke of Portland*, 3 Vesey, 494, was the application of the principle to an employment by the Duke to

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present a petition to the House of Commons on behalf of the other defendant, *George Tiernay*, complaining of the return of *George Jackson, Esq.*, as a member of parliament. See also, *Harris v. Roof's Ex'rs*, 10 Barb. on page 493.

This contract has the additional element of a division of the thing in dispute, which brings it within the definition of Champerty. See Bacon's abridgment, tit. Champerty. Champerty was a common law offence, and the statutes merely give additional penalties.

The common law upon the subject of champerty and maintenance is part of the law of *Indiana*. *Scobey v. Ross*, 13 Ind. 117, and the cases cited in note f. 2 G. & H. 160.

The case of *Sedgwick v. Stanton*, 4 Kernan, 289, was a contract to procure from a board of commissioners a patent for a tract of land, and it was held valid—1. Because from the character of the services to be performed, it contemplated nothing but the furnishing of evidence, and an open argument before the board. 2. Because the law, upon the subject of champerty and maintenance, was only in force in *New York* to a limited extent.

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CONTRACTS—FRAUD.—Executed contracts, made to hinder, delay, and defraud creditors, although void as to creditors, are binding upon the parties themselves; but executory contracts, made for the same purpose, are void, both as to creditors and between the parties, and will not be enforced.

APPEAL from the *Jefferson* Circuit Court.

HANNA, J.—Suit by *Welby* on promissory notes, and acceptances of said defendants.

The defence sets up, that, prior to the year 1854, said *Welby* and one *D. L. Armstrong* were for three years partners in mer-

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cantile business; that, in the latter year, said *D. L. Armstrong* was largely indebted individually, and as a partner; that said *Welby* desired to dispose of his interest in said mercantile establishment; and to shield the same from the creditors of said *D. L. Armstrong*, said *Welby* proposed that the said purchase should be made, and said business carried on, in the name of these defendants; to cover up said property, and hinder and delay the creditors of said *D. L. Armstrong* in the collection of their debts, and prevent them from attaching or executing said goods as the property of said *D. L. Armstrong*. In accordance with said proposition, it was so agreed, and the interest of said *Welby* in said concern was ostensibly sold to said defendants, but was, in fact, delivered to, possessed and disposed of by, said *D. L. Armstrong*, for his own use and benefit; that, at the time of said transaction, said *Welby* and said *D. L. Armstrong* represented the assets were ample to meet the payments as fixed and agreed upon by said *Welby* and said *D. L. Armstrong*; that it was further agreed and understood by and between the said *Welby*, said *D. L. Armstrong*, and these defendants, that, in consideration of the premises, they were not to pay, nor be called upon to pay, any part of said purchase-money, which was fixed in certain installments, and the paper sued on executed therefor, &c.; that they are informed said *D. L. Armstrong* has paid large sums, &c.

To this, in the various forms in which it was presented, demurrers were overruled.

Reply in denial. Trial by the Court; finding and judgment for the defendants.

The evidence is in the record, and tends to sustain the finding upon the issues submitted. Did the issues present a material and valid defence, if found for the defendants? In other words, was the transaction one tainted with illegality, and so much against public policy, as to forbid its enforcement,

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or prevent the maintenance of an action upon the paper so executed?

Our statute, 1 G. & H. 352, upon the subject of conveyances of goods, &c., with intent to hinder, delay, or defraud creditors, is similar to that of 13 Eliz. Under this *English* statute, it has always, we believe, been held, that conveyances to hinder, &c., creditors, are not absolutely void, but are considered binding between the parties. In this State, under a similar statute, the rulings have been repeatedly in accordance with those above referred to. *Findley v. Cooley*, 1 Blkf. 262; *Dugan v. Vattier*, 3 *id.* 245; *Scott v. Purcell*, 7 *id.* 66; *Laney v. Laney*, 2 Ind. 196; 4 *id.* 149; *Moore v. Meek*, 20 Ind. 484. In *New York*, in the case of *Nellis v. Clark*, 20 Wend. 24, S. C. 4 Hill. 424, the doctrine was confined to executed conveyances; and it was held, that executory agreements, entered into in fraud of creditors, could not be enforced between the parties. *Mosely v. Mosely*, 15 N. Y.—1 Smith, 385.

It appears manifest, from the pleadings, that the transaction, out of which grew the promises sued on, was entered into and carried forward, so far as the agreement was performed, with the intent to hinder and delay, if not to defraud, creditors of *D. L. Armstrong*, and that this purpose was not only known to the plaintiffs, but it is averred that said mode was suggested by him. It remains for us to say whether the distinction, taken by the *New York* cases referred to, is correct. It appears to us, the decisions named are founded on sound sense and reason, and are in consonance with a line of decisions adopted and followed by this Court upon kindred questions. We do not recollect, and have not been referred to, any case in this Court where this point arose, and the distinction now taken was urged upon the attention of the Court; although, without a just regard to such distinction, loose expressions may have been used which would apparently conflict with the conclusion now arrived at.

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Per Curiam.—The judgment is affirmed, with costs.

Hendricks & Matthews, and *Walker & Richardson*, for the appellant.

H. W. Harrington, for the appellees.

31	498
127	27
21	492
141	58

21	492
169	501

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PRACTICE—AMENDMENTS.—The *nisi prius* Courts may, in the exercise of a reasonable discretion, permit amended answers to be filed after previous answers have been withdrawn.

PRACTICE.—Where several paragraphs of an answer are substantially the same in legal effect, they may all but one be stricken out on motion; or, if they all amount to the general denial, where the latter is not pleaded in form, they may all but one be stricken out on motion, and, if the general denial be so pleaded, they may all be stricken out in like manner.

PRACTICE—DEMURRER.—But the only defects in pleadings, which can be obviated by demurrer, are those indicated in section 50 of the code; and demurrers filed for causes or defects not therein indicated, should be overruled.

PLEADING—ESTOPPEL.—*Quære*, whether an answer, averring facts which the party, by reason of something in the record, is estopped to plead, may not contain facts sufficient to bar the action, if the plaintiff joins issue thereon, without taking advantage of the estoppel.

CONTRACT—CONSIDERATION.—Where an instrument is executed as a contract, between private parties, acknowledging the receipt of the consideration, whether it be money, or specific articles, or a promise or undertaking to be executed by one party, it may be shown, in bar of a suit on such instrument, that the consideration was not received; and no recitals in such instrument will estop the party interested to plead the want or failure of consideration.

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PRACTICE—RIGHT TO OPEN AND CLOSE.—Where the plaintiff is required to introduce any evidence to establish his right to a judgment, or to show how much it should be beyond a mere nominal amount, he is entitled to open and close.

SAME.—Where the defendant pleads by way of confession and avoidance, or in such other manner as to admit the plaintiff's cause of action, or, in open Court, before entering upon the trial, he admits the plaintiff's cause of action, and thus obviates the necessity of any proof on his part, the defendant will be entitled to open and close.

IMPEACHMENT OF WITNESS.—Evidence designed to impeach the general character of a witness should relate to the time when he testified, and his character at the place where he then resided, and amongst those who knew it there.

EXAMINATION OF WITNESS.—The cross-examination of a witness should be confined to his examination in chief.

PRACTICE.—Objections to evidence, to instructions, to findings, general or special, or to special rulings or decisions of the Court, should be specific, and designate, with reasonable certainty, the grounds of the objections.

MORTGAGE—BOND—AGREEMENT.—Several interesting questions of construction are settled herein. See the opinion.

APPEAL from the *Union Circuit Court*.

PERKINS, J.—This suit, commenced in the *Dearborn*, and taken, by change of venue, to the *Union Circuit Court*, was instituted for the foreclosure of a mortgage, alleged to have been executed to secure the performance of the condition of a certain bond, reading as follows:

“Know all men by these presents, that we, *John Cobb* and *Oliver P. Cobb*, of the county of *Dearborn*, and State of *Indiana*, are held and firmly bound unto the city of *Aurora*, in the penal sum of 60,000 dollars, for the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and sev-

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erally, by these presents. Sealed with our seals, and dated this third day of *June*, in the year of our Lord one thousand eight hundred and fifty-three:

"The condition of the above obligation is such that: Whereas the city of *Aurora* has executed to the *Ohio and Mississippi Railroad Company* thirty bonds of said city of *Aurora*, dated the first day of *January*, in the year 1858, and numbered from one to thirty, for 1,000 dollars each, payable twenty-five years from date, bearing interest at the rate of six per cent. per annum, payable annually, on the first day of *January*, at the *North River Bank*, in the city of *New York*, which said bonds were executed by the city of *Aurora* to said railroad company, in part payment of a subscription of 50,000 dollars to the capital stock of said railroad company, made by said city of *Aurora*, by order of the city council of the city of *Aurora*, in which said bonds there is a stipulation, that the holders of said bonds should have a lien on the stock of said city, in said company, for which said bonds were received in payment; and that the holders of said bonds might exchange the same for a like amount of said stock at any time before the first declaration of a cash dividend, and be substituted as stock holders in place of said city, upon the surrender of any portion of said bonds; and whereas, the city of *Aurora*, in pursuance of an order of her city council, passed on the 3d day of *June*, 1858, has this day executed to the said *John Cobb* and *Oliver P. Cobb* a contract or deed, conveying, assigning and transferring to said *John Cobb* and *Oliver P. Cobb* all the right, title, interest and claim of said city of *Aurora*, in and to 30,000 dollars of the said stock subscribed by her in said railroad company, and represented by her said thirty bonds of said city, for 1,000 dollars each, and numbering from one to thirty, and dated and conditioned as aforesaid, with full right and authority on the part of said *John Cobb* and *Oliver P. Cobb* to receive the eight per centum inter-

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est in stock, upon said 30,000 dollars of stock, represented by the aforesaid bonds, until said company shall make a declaration of a cash dividend by said company, unless the holders of said bonds shall substitute themselves as stock holders, in the place of said city, by surrendering said bonds before the first declaration of a cash dividend; that the said *John Cobb* and *Oliver P. Cobb* should become the assignees and owners, absolutely, of the 30,000 dollars of the stock represented by said bonds, with full right and authority to receive the dividends, profits and advantages arising from the ownership of said stock, which contract was executed on behalf of said city to the said *John Cobb* and *Oliver P. Cobb*, in consideration that the said *John Cobb* and *Oliver P. Cobb* would assume all the obligations and liabilities on the part of said city of *Aurora*, on account of the principal and interest of the aforesaid bonds, and indemnify her against the principal and interest of said bonds by this bond, and by mortgage on real estate in the city of *Aurora*, a description of which is contained in a mortgage executed by the said *John Cobb* and *Oliver P. Cobb*, and their wives, to the city of *Aurora*, and bearing even date with these presents, and in consideration that the said *John Cobb* and *Oliver P. Cobb* would give to said city a lien upon said 30,000 dollars of stock in case the holders of said bonds should not substitute themselves as stock holders before a declaration of a cash dividend as aforesaid: Now, if the said *John Cobb* and *Oliver P. Cobb* shall well and truly pay, or cause to be paid, all the interest that may accrue on said bonds, numbered from one to thirty inclusive, for which the said city of *Aurora* may in any way be liable, according to the tenor and effect of said bonds, and save the city of *Aurora* harmless on account of the interest accruing upon said bonds as aforesaid; and in case the holders of said bonds shall fail to surrender said bonds, and substitute themselves as stock holders as to all or any portion of said bonds,

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before a declaration of cash dividends: If the said *John Cobb* and *Oliver P. Cobb* shall and do pay the principal and interest of said bonds that may not have been surrendered as aforesaid, and save said city of *Aurora* harmless on account of the principal and interest of said bonds, then this obligation to be void, else to remain in full force and virtue in law.

“Witness, &c., the day and year first above written.

“*OLIVER P. COBB*, [SEAL].

“*JOHN COBB*, [SEAL].”

Breaches of non-payment, &c., were assigned, and 3,500 dollars claimed as damages.

The condition of the mortgage, sought to be foreclosed, is as follows: “Provided, always, and these presents are expressly upon this condition: that, whereas, the said *John Cobb* and *Oliver P. Cobb* have executed to the city of *Aurora* their bond, in the penal sum of 60,000 dollars, bearing even date with these presents; and conditioned, among other things, that the said *John Cobb* and *Oliver P. Cobb* should pay the principal and interest of thirty bonds, executed by the city of *Aurora* to the *Ohio and Mississippi Railroad Company*, for 1,000 dollars each, in payment of stock in said railroad company, this day sold and assigned by said city of *Aurora* to the said *John Cobb* and *Oliver P. Cobb*, and save the said city of *Aurora* harmless on account of the principal and interest of said thirty bonds aforesaid, for 1,000 each, and numbered from one to thirty inclusive. Now, if the said *John Cobb* and *Oliver P. Cobb* shall well and truly pay, or cause to be paid, the principal and interest of said thirty bonds for 1,000 dollars each, and numbered from one to thirty, according to the tenor and effect of their bond aforesaid, executed by them to the city of *Aurora*, and save said city harmless on account of the principal and interest of said thirty bonds of said city of *Aurora*, for 1,000 dollars each, and numbered as aforesaid,

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and shall well and truly keep and perform all the conditions, and covenants on their part to be kept and performed in and by said bond, executed by them to said city of *Aurora*, in the penal sum of 60,000 dollars as aforesaid, then this obligation to be void, otherwise to remain in full force and virtue in law."

A demurrer to the complaint was overruled and exception taken.

The defendants answered. There was a demurrer to their answer, but as the ruling on it was waived by their afterwards filing a substituted answer, we need not inquire as to its correctness. *Caldwell v. The Bank of Salem*, 20 Ind. 294.

The substituted answer was this:

4. And for further answer to said complaint, defendants say that on or about the 3d day of *June*, 1853, they, the said defendants, entered into an agreement with the plaintiff for the purchase of 80,000 dollars of the capital stock of the *Ohio and Mississippi Railroad Company*, which the plaintiff represented that it had owned and legally subscribed for, and could and would sell and deliver to the defendants, and which stock was then of the par value thereof; and by virtue of which agreement it was also provided that the stock should be at once transferred to defendants and the certificates thereof immediately delivered to them, unincumbered by any other lien or condition except a lien to said city, for the payment of the interest and principal of thirty bonds, of 1,000 dollars each, which the plaintiff was to sell for the payment of said stock; and the further conditions that the holders of said bonds might have a lien thereon for the payment of the interest and principal of said thirty bonds, and might at any time, before a declaration of cash dividend, substitute themselves as stockholders for the said 80,000 dollars of stock, upon the surrender of said bonds, agreeably to the terms of said bonds, and that the said defendants were to have imme-

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diate and full possession and control of the said stock and the certificates thereof, and to be entitled to all the rights and privileges of stockholders in and to said stock from that time, subject only to the aforesaid liens and right of substitution. In consideration whereof, the said defendants were to execute and deliver to said plaintiff the bond and mortgage in the complaint described; and the said defendants aver that the said bond and mortgage were drawn up, and the said bond signed and sealed, and the said mortgage signed, sealed and acknowledged, to be delivered in pursuance with said agreement; and the said defendants admit that said plaintiff now has possession of the said bond and mortgage, but, they say, that the said possession is not rightful, and that defendants refused to make a delivery of the said bond and mortgage to the said plaintiff until the said stock was thus transferred and the certificates of said stock so obtained and delivered to defendants, and only upon the condition that the said stock be so transferred and the certificates so obtained and delivered, as aforesaid; and the said defendants aver that the said plaintiff never did transfer said stock to defendants and procure and deliver the certificates thereof to defendants according to the terms of said agreement, and that the said bond and mortgage never came into the possession of the plaintiff with the consent or by the permission of the defendants, nor was it the interest of the parties that the said bond and mortgage should be delivered as the bond and mortgage of defendants, or that it should take effect unless the said stock was so transferred, and the certificates thereof so obtained and delivered to them, as aforesaid; and the said defendants aver that the said plaintiff is not entitled to the said bond and mortgage or to recover anything thereon against said defendants; wherefore, defendants pray that the said bond and mortgage may be declared void and delivered up to defendants.

5. And for further answer to said complaint defendants say,

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that on or about the 8d day of *June*, 1853, they, the defendants, entered into an agreement with the said plaintiff for the purchase of 30,000 dollars of the capital stock of the *Ohio and Mississippi Railroad Company*, which the plaintiff represented that she owned and had legally subscribed, and could and would sell and deliver to defendants, and which said stock was then of the par value thereof, and by virtue of which agreement it was also provided that the said stock should be at once transferred to the defendants, and the certificates thereof immediately obtained and delivered to them unincumbered by any other lien or condition, except a lien of said city, for the payment of the interest and principal of the said thirty bonds of said city of *Aurora*, of 1,000 dollars each, which the plaintiff was to sell for the payment of said stock, and the further condition that the holders of said bonds might have a lien thereon for the payment of the principal and interest of said thirty bonds, and might, at any time before a declaration of cash dividends, substitute themselves as stockholders for the said 30,000 dollars of stock upon the surrender of said bonds, agreeably to the terms of said bonds, and that the said defendants were to have immediate and full possession and control of the said stock and the certificates thereof, and be entitled to all the rights and privileges of stockholders in and to said stock from that time, subject only to the aforesaid liens and right of substitution. In consideration whereof, the defendants were to execute and deliver to the said plaintiff the bond and mortgage in the complaint described, and the said defendants aver that the said bond and mortgage were drawn up, and the said bond signed and sealed, and the said mortgage signed, sealed and acknowledged, to be delivered in pursuance to said agreement; and the said defendants admit that the said plaintiff has possession of said bond and mortgage, but they say that the said possession is not rightful, and that the defendants refused to make said bond and mort-

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gage to the plaintiff until the said stock was thus transferred and the certificates thereof so obtained and delivered to the defendants as aforesaid. The defendants further aver that the city, through her officers, represented to the defendants that the plaintiff would not issue her bonds until the terms of said contract of sale and guarantee were settled and agreed upon, and also represented that the transfer of the stock and the issue of the stock certificates could only be made at the office of the railroad company, in the city of *Cincinnati*, in the State of *Ohio*, and that the said stock of the said company could only be obtained after the delivery and execution of said bonds, by plaintiff, to the railroad company; whereupon the said bond and mortgage were drawn up, and the said bond signed and sealed, and said mortgage signed, sealed and acknowledged, to be delivered and take effect from and after the transfer of the said stock and the delivery of the certificates therefor by said plaintiff to the said defendants, as aforesaid, and only upon that condition; and the defendants aver that the said plaintiff never did perform the said condition, and the said bond and mortgage never came into the possession of the plaintiff with the consent and by the permission of the defendants; nor was it the interest of the parties that said bond and mortgage should be delivered as the bond and mortgage of the defendants, or that they should take effect unless the said stock was so transferred and the certificates thereof so obtained and delivered, as aforesaid; and the defendants aver that the plaintiff never did transfer the said stock and obtain and deliver the certificates, as aforesaid. The defendants further aver that afterward, to-wit: on or about the first day of *August*, 1855, the plaintiff caused said stock to be issued to her with an indorsement, written in red ink across the face of the certificate issued therefor, that the said stock was subject to the lien of the holders of the fifty bonds of 1,000 dollars each, issued by the plaintiff to the railroad

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company, (a copy of which indorsement is herewith filed,) and thereby incumbered the said stock with 50,000 dollars of said bonds, contrary to said agreement. And the defendants aver that said stock was then of no value, and that no other stock was ever issued or offered to be delivered to the defendants by the plaintiff, or by the said railroad company, nor did the said defendants at any time ever enjoy the rights and privileges of an owner of said stock in said railroad company; but, on the contrary, the city of *Aurora* continued to exercise the right of ownership over said stock, and to represent the same in the elections of officers in said company, until the said stock became wholly worthless. Wherefore, the defendants aver that the said bond and mortgage were never delivered by the defendants to the plaintiff, and that she has no legal right to the same, and is not entitled to recover thereon. Defendants, therefore, pray that the said bond and mortgage described in said complaint be declared void, and be delivered up to the defendants.

The following is the indorsement written across the face of the certificates of stock in red ink:

"This stock, with 400 other shares of same stock, making in the aggregate 1,000 shares, is subject to the lien of the holders of certain bonds for 1,000 dollars each, numbered from one to fifty, issued by the said city of *Aurora* to the *Ohio and Mississippi Railroad Company*, dated *January 1, 185* , and all other conditions and stipulations in reference thereto stated in said bonds."

7. And the defendants, for further answer to the said complaint, say that at the time of the signing and sealing of the said bond, and the signing, sealing and acknowledgment of the said mortgage, the stock of the *Ohio and Mississippi Railroad Company* was of the par value thereof, and the said bond was signed and sealed, and the said mortgage was signed, sealed and acknowledged as a part and parcel of the agree-

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ment set up in paragraph No. 5; and the defendants aver that the said plaintiff never complied with the said agreement; that said city never transferred the said stock, and obtained and delivered the certificates thereof, in compliance with said agreement, and never at any time offered to deliver any stock whatsoever, except as herein stated; that, on or about the first day of *August*, 1853, the plaintiff had the said stock issued to her, incumbered with the payment of fifty bonds of 1,000 dollars each, and the interest accruing thereon, issued by the city of *Aurora* in payment of 50,000 dollars of the stock of said railroad company, and then offered the same to the defendants, thus incumbered and the defendants aver that at the time of the said offer the said stock of said company was worth in the market but ten cents on the dollar, and the stock thus incumbered was wholly worthless; and the defendants aver that they never could get the said stock as per the said agreement; that the city of *Aurora* claimed and exercised the right of a stockholder in relation to said stock; voted the same at the annual elections till on and after the last named date. And defendants aver that by reason of the premises, they were wholly deprived of the rights contemplated by said agreement, and the right to secure and protect themselves against the said bond and mortgage, and that the plaintiff is not entitled to recover any sum against them whatsoever.

The plaintiff moved to strike out the paragraphs of the amended answer on three grounds; but the Court refused the motion. The grounds were:

1. That the Court improperly permitted them to be filed after the original answer had been withdrawn.

Touching this ground of the motion, we may say that it was in the power of the Court to permit the amended answer to be filed. That power was to be exercised with reasonable

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discretion. For aught that appears, it was so exercised in this case. See *Morris v. Graves*, 2 Ind. 354.

2. That the paragraphs of the amended answer were all alike. If such were the fact, the Court might properly have stricken out, in any event, all but one of them. Whether the refusal to thus strike out, where the Court might have done it, would constitute error, will be remarked upon, when noticing another point.

3. That the paragraphs severally amounted but to the general denial. If such were the fact, and the general denial, in form, was on file, the Court might properly, perhaps, have stricken them out; and, if the general denial was not on file, in form, still, if the paragraphs of the amended answer severally amounted but to the general denial, the Court might properly have stricken out all but one of them, especially, if the motion had been thus limited; but would certainly not have been bound, in such a state of facts, to strike out a part on a motion to strike out all.

After the Court had overruled the motion to strike out, the plaintiff demurred to the paragraphs of the substituted or amended answer, and assigned for causes:

1. That they amounted to the general denial, which was already pleaded in form.

2. That they attempted to set up matter which the defendants were estopped, by the recitals in the bond and mortgage sued on, to plead.

The demurrer was overruled.

The plaintiff then replied in denial of the answer. There was a trial, and a judgment for the defendants.

Did the Court err in overruling the demurrer to the substituted answer?

By the code, there are six grounds of demurrer:

1. No jurisdiction.
2. Want of legal capacity to sue.

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3. Another action pending.
4. Defect of parties.
5. Want of sufficient facts.
6. Improper joinder of causes of action.

The first ground of demurrer to the substituted answer was neither of these six, and, of course, the demurrer, by the express provision of the statute, would have had to be overruled, had it assigned but that cause. 2 G. & H., p. 81. As to the second ground, it is argued that, an answer setting up matter which a party may be estopped to plead, may contain facts enough to bar the action, if the party takes issue upon it, as he may do, thus failing to take advantage of the estoppel. It is claimed that this is like failing to take advantage of the statute of limitation. As to that statute, a party may sue upon facts barred by that statute, but if the party do not avail himself of the statute, the facts will be sufficient to constitute a cause of action. So, facts, not allowed to be pleaded because they constitute a departure, nevertheless may be sufficient, if the departure be not properly taken advantage of. It is claimed that the irregularity in such cases is to be taken advantage of by motion to strike out; that it is no more inconvenient than, and is equally effective as a remedy, as a demurrer, and is the mode prescribed by statute. *Reilly v. Rucker*, 16 Ind. 808. But see *Ensey v. The Cleveland, &c.*, 10 Ind. 178. We pass this point, as it will appear as we proceed, that no estoppel exists in the case. This leads us back to the act of the Court in overruling the motion, which was made to strike out, &c.

We inquire then:

1. Did the paragraphs of the answer amount severally to the general denial?

If they did, we may observe, it is difficult to perceive what harm they did the plaintiff. Suppose a defendant should repeat, in form, the general denial three or four times; that the

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plaintiff should move the Court to strike out all but one of them, and the Court should refuse, but proceed with the trial upon an issue four times repeated; what harm would the plaintiff have experienced? The Court would have violated technically correct practice in point of form and simplicity, and unnecessarily incumbered the record, but what harm could the plaintiff have experienced touching the merits of the cause? And more especially, what harm could he have experienced if those general denials had been special, setting out, and thus notifying the plaintiff of the facts which the defendant intended to prove upon the trial? But we waive this point. See Stephen on Pl. 422 and note.

Again, a defendant may, in many cases, according to correct rules of pleading, plead specially what might be given in evidence under the general denial. *Mr. Stephens* says, "it is laid down that the reason of pressing a general issue is not for insufficiency of the [special] plea, but not to make long records where there is no cause." *Ubi supra*. However, we waive this point, also, because we think the paragraphs should be regarded, not as in effect general denials, but at all events, as answers of want of consideration. The paragraphs may be double. They do not show how the plaintiff got possession of the bond and mortgage—they do not show that the bond and mortgage were ostensibly delivered to the city as an escrow, or at all. They aver that the city has them, but wrongfully. They contain, perhaps, the requisite averments of special answers of *non est factum*—some facts tending to show fraud, and certainly all the averments necessary to show want of consideration. No objection was made to them for duplicity, by motion, and duplicity is not a cause of demurrer. See 2 G. & H. *supra*.

Failure of consideration may be pleaded, under the code, "to any action," &c., "upon, or arising out of any specialty bond or deed, except," &c. 2 G. & H. 106. What then are

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the facts in the case at bar? The city of *Aurora* agreed to assign her stock in the *Ohio and Mississippi Railroad Company* to *Cobb* and *Cobb*, the defendants, subject to certain rights of third persons, in consideration of the bond and mortgage now sued on, which assignment was to be concurrent with the delivery of the bond and mortgage. Now, the answer avers with some variation, as is justified by the rules of pleading, in the several paragraphs, *counts*, in legal effect, according to common law pleading, that the plaintiff got possession of the bond and mortgage without delivering the consideration, viz: the assignment of stock subject to the rights of third persons or otherwise according to agreement. It thus sets up a good bar to the action. And the defendants were not estopped by the recital in the bond and mortgage of the delivery of the assignment, to aver the non-delivery. These instruments were drawn up to speak after delivery and the receipt concurrently of the consideration, not as speaking at the time they were being drafted; and we lay down the proposition that, where an instrument is executed as a contract on one side, between private parties, reciting the reception of the consideration as being concurrently delivered, whether that consideration be money, or specific articles, or a promise or undertaking to be executed by the other contracting party, it may be shown in bar of a suit on such instrument, that the consideration was not received. There is no estoppel, in such case, to plead want of consideration received. Our code provides, (2 G. & H. p. 180, sec. 275,) that, "recitals in any written instrument shall have no greater effect than they have heretofore had in writings not under seal."

One of the paragraphs of the answer admitted the offer on the part of the plaintiff to deliver to the defendants the 80,000 dollars of stock contracted for, but subject to the lien, not of 80,000 dollars of bonds, as the defendants were willing to receive it, but to the lien of 50,000 dollars of bonds. This

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was not a good tender of the stock by the city. It was made upon an erroneous interpretation of the contract between the parties. There were 50 shares of stock, and there were 50 bonds, each for the amount of a share of stock. The 50 bonds were a lien upon the 50 shares of stock, but the lien was several to this extent, that no one bond could be a lien upon more than one share of stock, though the particular share was not identified. This is plain from other provisions of the contract above set forth in the bond and mortgage. It is provided therein that every holder of a single bond may convert it into a share of stock. No one bond, therefore, can bind more than one share of stock. If it could, then every one of the bonds could not be converted into a share of stock as stipulated.

But it is contended that, the answer is inconsistent with the recitations of the contract in the bond and mortgage sued on, and involves the necessity, in its proof, of a violation of the principle that parol evidence can not be given to contradict a written instrument. Let us see. The bond recites that the city of *Aurora* was to execute a written instrument transferring the stock. The mortgage, executed at the same time, and a contract of equal dignity, recites that the city was to transfer the stock and assign the certificates. The two instruments must be taken together. Now, the answer exactly negatives performance, on the part of the city, of the contract as stated in the mortgage. It also negatives performance of the contract as stated in the bond, and further, states an additional act to be performed, and negatives the performance of it, which act, it is alleged, was a part of the consideration, &c. But such additional consideration might legally be stated, and proved by parol evidence, even were it not recited in the mortgage. *Rockhill v. Spraggs*, 9 Ind. 32. See also, 12 Cush. 591.

Viewing the answer, then, as setting up want of consider-

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ation, neither the demurrer nor motion to strike out, was well taken to it. We incline to think the paragraphs of the answer, also, contain the requisite averments of a special answer of *non est factum*, by way of confession and avoidance. As answers of *non est factum* they amount to this: They state that we, the defendants, admit that we signed the bond and mortgage sued on, to be delivered to you, the plaintiff, when we should give our consent; that is, when certain conditions were concurrently performed; but they aver that, though the bond and mortgage have been actually delivered, and are now in the plaintiff's possession, yet that they have not been legally delivered so as to vest the title, because they were delivered without the defendants' consent, &c.

This form of pleading, we think, admits a *prima facie* case in favor of the plaintiff, and undertakes the avoidance of it. 1 Green. Ev., 10 ed., p. 50, sec. 38; also, secs. 284, 285. Doubtless the defendants might have elected to answer the general *non est factum*, under which all the facts could have been given, but the burden of the issue would have been thrown upon the plaintiff. *Union Bank of Maryland v. Ridgley*, 1 Har. & Gill, 353, is in point. So is *Pitman v. Kintner*, 5 Blackf. 250.

But we decide the cause upon the answers, viewed as answers of want of consideration. The record satisfactorily shows that the general denial was withdrawn, before going into trial; hence, as the paragraphs of the answer set up affirmative matter, the right to open and close was with the defendants, unless the plaintiff was bound to prove her damages. *Mercer v. Whall*, 5 Ad. & Ell. 48, Eng. Com. Law Rep. p. 447.

At common law, in a suit upon a note, it is probable that the plaintiff would have been bound to give his note in evidence to prove his damages; but under our code, as the plaintiff must place his note, or a copy of it, on the record with

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his complaint, thereby placing the means of computing the damages before the Court, and rendering the record a security against a second recovery on the note, it is held that, where the note is admitted, no evidence need be given by the plaintiff to show the amount for which judgment is to be rendered; and, hence, that where the note is admitted but avoided by new matter, the right to open and close is with the defendant. *Bowen v. Spears*, 20 Ind. 146. The rule seems to be that where the plaintiff is bound to give any evidence to establish his right to a judgment, or to show how much it should be beyond a mere nominal amount, he has a right to open and close. In actions of slander, it may be observed, except where special damages are claimed, proof of damage is not required. Our code provides that "allegations of value or amount of damages shall not be considered as true by the failure to controvert them." 2 G. & H. 100, sec. 74. A similar section in *Kentucky* seems to be held applicable only to actions of tort. 15 B. Mon. 680. The section, in our code, as we have already seen, is held not to apply where the suit is upon a written instrument which, in itself, liquidates the damages. Perhaps the bond and mortgage in this case, upon their face, furnished the data upon which the Court would *prima facie* have been bound to calculate the damages at the amount of the several installments of interest sued for, the amount not being denied by the answer. See 2 G. & H. p. 101, notes. But this we need not decide. It will be conceded that if the defendants had expressly admitted the amount in their answer the plaintiff would not have been required to adduce any evidence on the point. Now, the record informs us that the defendants, before going into trial, did expressly admit the amount in open Court. This obviated proof. See *Johns et al. v. Harrison et al.* 20 Ind. 817.

The opening and close were rightly given, in this case, under the circumstances, at all events, to the defendants.

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On the trial, as has been stated, the defendants obtained judgment. A motion was made for a new trial, and nineteen grounds therefor stated.

The two first, that the verdict was contrary to law and evidence, we can not pass upon, because the record does not purport to contain all of the evidence. *Hamilton v. Johnson*, 20 Ind. 392. What we have already said, also disposes of the 5th, 6th, 7th and 9th grounds for a new trial. The third is too general. Some of the instructions were correct, and those erroneous should have been specified. This third ground is in these words: "The Court misdirected the jury in the charge given to them." The 4th, 10th, 11th, 13th and 15th grounds are obnoxious to the same objection. *Scoville v. Chapman*, 17 Ind. 470. We proceed to another ground.

The deposition of *Solomon P. Tummy*, was taken in *Detroit, Michigan*, in *October, 1862*, of which city he appears, by the deposition, to have been at the time a resident. The plaintiff, to impeach his character, asked a witness what *Tummy's* character was, at that date, in *Aurora, Indiana*. This question was, *prima facie*, irrelevant, because it did not seek to ascertain his character among his friends and neighbors. 1 Green. Ev. sec. 461.

The plaintiff then asked when *Tummy* left *Aurora*, and under what circumstances. This question, had it been limited to the first clause, of it, viz: that inquiring when *Tummy* left, would have been unobjectionable; but, by the second clause, it was made to cover too much, and was, therefore, rightly excluded as a whole. If it had turned out that *Tummy* left a long or considerable time before his deposition was taken, inquiries as to his character at *Aurora* would have been impertinent, because the plaintiff would have no right to prove his character at such times. Evidence of character must go to show it at the time a witness testifies. A bad man may suddenly become a legally good one, and worthy of credence.

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But the second clause of the question was an indirect mode of getting at character at what might turn out an improper time. *Walker v. The State*, 6 Blackf. 1.

Tumy's deposition was read in evidence. It covers forty-five pages of foolscap. The record states that the plaintiff excepted to its being read, but states no ground of objection. We can not search the deposition to find such, nor was the Court below bound to. Nothing appears showing *Tumy* to have been an incompetent witness. See, as to this point, 2 G. & H. 178, secs. 265, 266; *Russell v. Branham*, 8 Blackf. 277; *Torr v. Torr*, 20 Ind. 118.

The *Cobbs* paid the interest on the city bonds for a year or two. It was claimed that that fact was an admission of a completed contract with the city. Parol evidence was admissible to show that the payment was upon other considerations.

The Court is said to have erred in giving special interrogatories to the jury to be answered, or for special findings, but why was not stated to the Court below. The objection need not be noticed.

It is objected that all the special questions were not answered, but the Court was not asked to send the jury back to supply the omission. *Rosser v. Barnes*, 16 Ind. 502.

In some instances, objection was made to questions put to witnesses, but no objection was made to the answers; hence, it is insisted, that objections to them may be considered as waived. Though the questions were illegal, it is argued, still the answer may, in the opinion of the objector, have been harmless or favorable to himself, and its exclusion from the jury not desired. We do not concur in this view, but still do not think the error in this case was so material, as presented by the record, that it should reverse the case. If the answer be harmless, it is not important that the question was improper. 19 Ind. 818.

It is the rule, in this State, that the cross-examination must

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be confined to the matter of the original examination. 6 Ind. 417; 12 *id.* 256, 455; Davis' Dig. 859, secs. 84, 85.

The Court was asked to give its general instructions in writing, which it did not do; but it is not shown that the request for written instructions was handed to the Court in proper time to enable the Court to prepare them before the close of the argument. 16 Ind. 275; 10 *id.* 338.

It is objected that the Court did not instruct the jury generally at all, but only gave the special instructions handed up by both parties. If those instructions covered the entire case, we see no reason why the Court should have given further instructions of its own preparing. We must presume that the Court below considered the whole ground covered. And if it did so, it would hardly know what further to say.

But we will not continue answering these objections; and, owing to the length to which this opinion is extending, we have been brief in our notice of numerous points remarked upon, but, we trust, none the less understood. We have felt that it was due to the counsel, who have so ably and thoroughly argued the cause in this Court, as well as to the importance of the cause to the parties, in a pecuniary point of view, that we should not entirely omit to notice any plausible point made. We notice one, and but one more, in conclusion.

On the day that the cause was set for trial, being the fifth day of the term, the plaintiff asked for a continuance on account of the absence of several witnesses, who had been subpoenaed, and of two who had not been. The continuance was refused, but the cause went over for about two weeks—ample time to have procured the attendance of the witnesses subpoenaed, and most of whom, in fact, appear to have been present when the cause was tried. When the cause came on for trial, the motion to continue was not renewed. The cause had been pending about eleven months, and no valid excuse is shown for failing to subpoena, or to procure the depositions

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of the witnesses not subpoenaed. The continuance, when asked, was rightly refused to another term, but properly granted temporarily.

We discover no error for which the judgment below should be reversed.

Per Curiam.—The judgment is affirmed, with costs.

Abram Brower, Jr., and Thomas G. Mitchell, for the appellant.¹

J. D. Haynes and T. D. Lincoln, for the appellees.²

(1) The counsel for the appellant argue:

A plea which, professing to answer an action based upon a written contract, sets up a state of facts on the contract, varying the terms of the writing, is a bad plea on demurrer, because the terms of a written contract can not be changed or varied by proof of what was said, or agreed to, before or at the time of the making of the written contract. 1 Blackf. 191, and note; 5 *id.* 18; *id.* 273; 6 *id.* 183; *id.* 509; 7 *id.* 378; *id.* 432; 5 Ind. 184; 8 *id.* 79; *id.* 256; *Van Ostend v. Reed*, 1 Wend. 424; 1 Greenl. on Ev., 315 *et seq.*; 1 Parsons on Cont. 355-6; 2 *id.* 60, 61 and note; 11 Ind. 280; 6 *id.* 379; 3 *id.* 198; 10 *id.* 32; 10 *id.* 188.

A deed may be delivered to a stranger to take effect on a condition to be subsequently performed; but if it be delivered to the obligee on such a contingency, the contingency is a nullity and the delivery absolute. *Foley v. Cowgill*, 5 Blackf. 18. One obligor may, perhaps, deliver a bond to another co-obligor, as an escrow, but an instrument can not be so delivered to the obligee or to the payee, or the *agent of either*. *The State, &c. v. Chrisman*, 2 Ind. 126. And parol evidence can not be given to vary the legal effect of such delivery, or the terms of the instrument delivered. *Hiatt v. Simpson*, 8 Ind. 256; 7 Ind. 600; 2 Abbott's N. Y. Dig. 678; 4 Pick. 520; 8 Mass. 238; 23 Wend. 45; 10 *id.* 313; 5 N. Y. R. 229.

Where a pleading contains allegations which, by reason of the recitals in some contract or other instrument of record in the case the pleader is estopped to aver, such pleading will be demurrable. 7 Ind.

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600; 8 *id.* 324; *id.* 367; 16 *id.* 219; *id.* 143; *id.* 180; *id.* 368; 15 *id.* 161; 4 Blackf. 435; 3 Ind. 449.

(2) The counsel for the appellees argue:

The granting or refusing of continuances is a matter resting in the sound discretion of the Court, and is not ground of error. 16 Vermont R. 16; 3 Hayw. 145; 4 Humph. 472; 1 Hemp. 265; 9 Rich. L. 454; 1 Miss. 74; 15 Ala. 43; 4 Ind. 202; 8 *id.* 420; 1 Blackf. 50.

Estoppels are odious, and are only applied to prevent frauds, and never in aid of frauds. 7 Barb. 409; 14 Cal. R. 367; 39 Maine 581; 2 Zab. N. J. 691.

A bond, mortgage or other instrument must come to the possession of the party claiming under it, by the consent of the grantor or obligor, or it is no delivery. 34 N. H. R. 260; 11 Foster 332; 4 Harr. (Del.) 78; 12 Johns. 422; 34 N. H. R. 460; 17 Geo. 267; 10 Ind. 184. The grantee must also intend to receive it as his deed, &c. 1 Johns. Cas. 116; 12 Johns. 421; 2 Wend. 318; 20 Johns. 187.

An equitable title to real estate may pass by writing, without deed, and the party may hold and enjoy the same. Yet, if he contract for a title, the law will see that he receives a deed. So, in many cases, certificates of stock are necessary to give to the owner all the rights of a stockholder. The transfers in most cases should be made upon the proper books of the company. 42 N. H. R. 452, 3 Zab. (N. J.) 75; 20 Cal. 529; 3 T. B. Mon. 128.

The question of opening and close, on the trial of a cause, is, at the common law, wholly within the discretion of the Court, and the determination of it is no ground of reversal. 8 Conn. 303; *id.* 261; 16 Ohio 330; 7 Wis. 19; 8 Clarke 335; 1 Greenl. Ev. § 76; 7 Eng. L. and E. R. 381; 10 Jurist 390. But the rule in *Indiana* is fixed by statute. 11 Ind. 220; 20 *id.* 320; 7 Ind. 229; 7 Blackf. 164; 16 Ind. 294.

Simple possession of such instruments as bonds, certificates of stock in railroad companies, and other corporations, is *prima facie* evidence of delivery. 27 Penn. 35; 18 Maine 200; 4 Cush. 287; 4 Florida 373; 10 Rich. Eq. 219; 1 Zab. 287; 6 Pet. 137; 5 Blackf. 160; 4 Ind. 469; 10 *id.* 473; 15 *id.* 280; 16 *id.* 285; 7 *id.* 575.

It is also held that the recording of such instruments as mortgages

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is presumptive evidence of delivery. 34 Penn. 252; 34 Mass. 708; 1 Head 576; 40 Maine 585; *Jackson v. Perkins*, 2 Wend.; *Gilbert v. A. Ins. Co.* 23 Wend.; 1 Penn. 43; 12 Cal. 232.

Where a party objects to a whole mass of testimony as incompetent, he must show that every particle of it is incompetent, or his objection must be overruled. The Court is not bound to look it over, and separate the good from the bad. He must put his finger on the bad, and call the attention of the Court to it. And hence, if any particle of the evidence objected to should have been admitted in any aspect of the case, or for any purpose in it, the objection must fail, and it is not error to overrule. 13 Pet. 338; *id.* 310; 11 Md. 408; 1 *id.* 474; 15 Ala. 535; 3 Gill. 220; 2 Ind. 46; 1 *id.* 540; 2 *id.* 203; 5 *id.* 455; 3 *id.* 329; 8 Blackf. 277; 3 Ind. 503; 20 Ind. *id.* 129; 38 N. H. 332; 3 How. U. S. R. 550; 8 Blackf. 366.

It may always be shown in reference to deeds and other instruments, that there were other considerations than those named. 12 Cush. 591; *id.* 32; 2 Zab. 691; 18 Pick. 113; 17 Ves. 200; 4 Florida 387; 12 Ind. 348; 1 *id.* 61; 9 *id.* 32; 3 Blackf. 189.

A party has no right to put a question, on cross-examination of a witness, which is not made legitimate by some question propounded in the examination in chief. 6 Ind. 420; 12 Ind. 258; *id.* 458; 14 Pet. 461; 1 Greenl. on Ev. § 445.

All exceptions are construed most strongly against the party taking them. 15 Ala. 18; 18 *id.* 719; 21 *id.* 204; 30 *id.* 244. And where a party excepts to a charge generally, he must show that every proposition in it is false in law. 4 Seld. 43; 2 *id.* 236; 1 *id.* 428; 30 Barb. 264; 2 How. U. S. R. 382; 3 Gill. 220.

In an action to enforce a contract evidenced by bond and mortgage, in a Court having equitable jurisdiction, the defendant, upon proper issues, may have the contract declared to be void and ordered to be delivered up, and, especially, where the invalidity of the contract does not appear on its face, but requires proof. 3 Daniel's Chan. Pr. 1,744; 1 Dana 590; 27 Conn. 313; 28 Geo. 442; 31 Barb. 368; 7 Ves. 19; 17 *id.* 112; 18 *id.* 60; 2 Swan. 545; 1 Ves. and B. 244; 1 Johns. Chan. 522; 13 Ves. 586; 10 *id.* 218.

Appellate courts will often presume in favor of the rulings of in-

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ferior courts, that pleadings were properly filed, although they do not appear in the record. 28 Ala. 216; 15 Texas 273; 11 Ills. 237; 3 Scam. 53; 2 Gilm. 357; 2 Blackf. 11; 20 Ind. 451. And that material issues in the way of the judgment were disposed of. 20 Ind. 519; 2 Gilm. 557; 6 Ind. 373.

Where the instrument sued upon is but a part execution of, or the consideration for, some other agreement, resting in parol, then parol evidence is competent to show the agreement and consideration. 15 Ind. 340; 4 Florida 373; 12 Ind. 348; 17 Ves. 200; 15 Ind. 152; 6 Minn. 532.

All objections to the form of questions, such as that they are leading, or otherwise imperfect in form, are deemed to be waived, unless specially pointed out and insisted upon as such, and are even then questions of discretion only. 6 Blackf. 68; 17 Ala. 468; 38 N. H. 332; 1 Hilton 163; *id.* 56.

21	516
128	130
21	516
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21	516
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TITLE TO OFFICE—APPOINTMENT.—Where the title to an office is derived solely from Executive appointment, the commission of the Executive is the only legal evidence of such title.

SAME—ELECTION.—But, where the title to an office is derived from popular election, the commission of the Executive is not absolutely necessary to establish the right to exercise the duties of such office.

VACATION OF OFFICE.—An office may be vacated by abandonment, or resigned by parol, and the existence of a vacancy in either case will depend upon all the facts and circumstances attending the same.

COUNTY AUDITOR—DUTIES OF.—A county auditor is required, both by the constitution and laws of *Indiana*, not only to be a resident of, but actually to reside in, the county, and keep his office in the auditor's office to be provided by the county, and personally discharge, or superintend the discharge of, the duties imposed upon him by law.

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VACATION OF OFFICE.—Any voluntary act of such officer, which permanently disables him to perform the duties of his office, such as enlistment in the military service of the *United States* in the war for the suppression of the present rebellion, will amount to a constructive resignation of his office by abandonment.

CONSTITUTIONAL LAW.—*Seemle*, that the act of *May 11, 1861*, (Acts Spec. Sess. 1861, p. 40,) so far as it undertakes to empower county auditors to enter the military service of the *United States*, and discharge the duties of their civil offices by deputies alone, is unconstitutional.

APPEAL from the *Vigo* Common Pleas.

PERKINS, J.—A complaint or information, as follows, was filed in the *Vigo* Common Pleas:

“The relator informs the Court that the defendant, *Edward B. Allen*, was duly elected Auditor of *Vigo* county, *Indiana*, in *October, 1859*; and that, after said election, he duly qualified, and entered upon the duties of the office, and continued to discharge the same till the 1st of *August, 1862*, when he vacated said office by abandoning the same, in this, to-wit: on said day he volunteered as a private, in company *B*, of the 11th regiment of *Indiana* volunteers, and, on the 14th of said month, with said regiment, was duly mustered into the military service of the *United States* for three years, or during the war; that on the 16th of *August, 1862*, he was, by the members of said company, elected their captain, and from that time entered upon the duties of captain, and held himself out to the public, and the officers and privates of said regiment, as captain, and was, by the public and military authorities, recognized and accepted as such; that said company *B* was recruited in said *Vigo* county, and went into the service as one of the companies from said county; that both the Governor and Adjutant General of the State knew of the defendant acting and being recognized as captain, as afore-

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said, and consented and permitted him so to act; that the defendant never received from the Governor a commission as captain; that on the 17th day of *August*, 1862, said regiment was ordered to *Kentucky*, and was in the battle of *Richmond*, on the 30th of *August*, in which all the field officers were killed, and said defendant, as senior captain, made an official report of the battle to *W. H. Fairbanks*, A. A. Adjutant General of the brigade to which said regiment was attached, and said report was accepted by him, and said *Allen* had said report, over his own signature, as commanding captain, published, on the 8th of *September*, in the *Terre Haute Express*, a paper of general circulation in said county, published at *Terre Haute*; that defendant, from the time of his enlistment, as aforesaid, totally absented himself from said office of Auditor, and appointed no deputy to discharge its duties, and remained absent in the army, as aforesaid, until the general election, held in said county on the 14th of *October*, 1862, all of which facts were well known to the voters of said county; but that, on the 28th of *October*, 1862, he returned and wrongfully intruded himself into said office, and continues to discharge the duties thereof, claiming to be the legal officer; that at that general election, in *October*, 1862, the clerk had made no certificate to the sheriff, and the latter had given no notice, as required by law, that there would be an election for county Auditor, but at said election a poll was opened in all the precincts, for the election of Auditor in said county, and the relator, *Burwell H. Cornwell*, a resident of said county, and eligible to said office, was a candidate therefor, and the only one voted for at said election for said office, and received therefor 1,700 votes; that the board of commissioners of said county refused to declare the relator elected Auditor; that he, on the 20th day of *October*, 1862, procured the clerk of the Circuit Court to make out a duly certified transcript of the certificate of the board of judges of the several precincts

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of said county, containing the votes of said relator for said office, and had the said clerk mail the same to the Secretary of State, and on the 8th day of *November*, 1862, he demanded, from the Governor of the State, a commission as Auditor, as aforesaid, which he refused in writing to issue, a copy of which refusal is as follows: "I refuse to issue this commission on the ground, it is alleged, there was no vacancy in said office. *O. P. Morton*, Governor;' that on the 13th of *November*, 1862, at a special session of the board of commissioners of said county, he tendered his official bond, and it was accepted by the board; that on the 3d of *November*, 1862, he duly took the oath of office before the clerk of the *Vigo* Circuit Court, and, on the same day, demanded of the defendant the books, &c., and possession of said office of Auditor of *Vigo* county, which defendant refused to surrender; wherefore the relator sues for said office and 1,000 damages.

"RISLEY, SMITH and MACK, for Relator."

A demurrer was sustained to the complaint, and the plaintiff appealed to this Court; and afterwards, as appears by a supplemental record, final judgment was rendered in favor of the defendant. The appeal was premature. By oversight, no final judgment was rendered on sustaining the demurrer; and such judgment was not rendered till after the appeal had been taken. When the Court did render final judgment, it was asked to render it *nunc pro tunc*, but refused so to do; because no final judgment had before been rendered, and, hence, there was no case made for a *nunc pro tunc* entry of such judgment; but, says the record, the Court entered the final judgment, not for the reason that the same had been heretofore pronounced, but because it is now proper that judgment shall be rendered upon the issue between the parties under the law.

But, notwithstanding the appeal is informally here, still

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the record is all before this Court, and it may, in its discretion, proceed to determine the legal questions presented by that record. This is in accordance with the general line of judicial precedent, and is sanctioned by an example furnished by so illustrious a tribunal as that of the Supreme Court of the *United States*, under the presidency of Chief Justice *Marshall*, he himself delivering the opinion in the given case. *Marbury v. Madison*, 1 Cranch, 137. We can not greatly err in following the precedent set by so learned and pure a Court. See also, *Prigg v. The Commonwealth, &c.*, 16 Pet. 539. In *Church v. Hubbard*, 1 Cond. Rep. 385, on p. 390, Chief Justice *Marshall* says:

“If in this case the Court had been of opinion that the Circuit Court had erred in its construction of the policies which constitute the ground of action; that is, if we had conceived that the defence set up, would have been sufficient; admitting it to have been clearly made out in point of fact, we should have deemed it right to have declared that opinion, although the case might have gone off on other points; because it is desirable to terminate every cause upon its real merits, if those merits are fairly before the Court, and to put an end to litigation where it is in the power of the Court to do so.”

The public interest, also, demands an early decision of the merits in the case at bar, and private interest will not suffer from such decision. It is important that the people of *Vigo* county should know who is their legal Auditor; and delay can be of no benefit to *Allen*, for if he is not rightly in office, he will be liable to the legal officer for the fees of the office. *Glasscock v. Lyon*, 20 Ind. 1. We proceed to examine the case.

We shall lay out of view, in making our decision, one of the questions presented by the record, viz: whether the defendant, *Allen*, was a captain or not, of his company, because

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that question does not appear to be material to the final result. We may simply remark, that, it is probably the law that where the title to an office is solely derived from Executive appointment, the commission of the Executive is the only legal evidence of such title. *Beal v. Morton*, 18 Ind. 346; while, on the other hand, where the title to an office is derived from popular election, the commission of the Executive is not absolutely necessary to the right to exercise the duties of such office. *Glasscock v. Lyon*, 20 Ind. 1. It is probable in this case, that *Allen* remained a private, but acting as a sort of *de facto* captain.

Coming now to the case before us, we may first observe that upon the face of the record, the validity of *Cornwell's* election is settled by former decisions of this Court, if a vacancy existed proper to be filled by election, at the date of his election. See *The State ex rel. v. Jones*, 19 Ind. 856. The only question, then, presented by the record now submitted, requiring examination and decision, is, does it show that *Allen*, the prior incumbent, had vacated the office of Auditor of *Vigo* county 20 days, or more, prior to the alleged election of *Cornwell*. If a vacancy existed, it was because *Allen* had in a legal point of view, abandoned the office. An office may be vacated by abandonment, which is a constructive resignation. An office may be resigned by parol, and of course, acts may speak that resignation.

It will aid us in determining whether an incumbent has abandoned an office, by first ascertaining what he is required to do as an occupant of the office.

The auditor of a county is bound, by the constitution and laws of the State, not simply to be a resident of the county, in the general sense of that term, but he is bound to "reside" in the county, to keep his office in the auditor's office located by the county, and to faithfully discharge the duties of the office. He certainly must discharge the duties of the

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office, for he takes an oath and gives a bond to do that. He may have a deputy to assist him, but the duties of the office must be discharged under his supervision. If this is not so, the theory of the people having a right to designate who shall be their auditor is a delusion. It is a familiar principle of law that the acceptance of every office is upon an implied contract that the acceptor will perform its duties with integrity, diligence and skill. 3 Black. Comm. 164.

And it is further a familiar principle that offices like franchises, may be forfeited by mis-usuer and non-usuer.

Now, whenever the auditor voluntarily permanently disables himself to perform the duties of his office he, by that act, constructively resigns the office by abandonment of it. A temporary disability to discharge the duties of the office might not, of itself, create a vacancy. In an office, capable of being served by deputy, the deputy of the principal might, doubtless, continue to act during the temporary disability of the principal; and, if no deputy had been appointed, perhaps the sureties of the principal might appoint. See *The State v. Pidgeon*, 8 Blackf. 132. But a disability designed to continue for the whole term of office must vacate the office. And the question now arises, did the auditor, in this case, by enlisting as a private soldier, in the army of the *United States* for three years, or during the existing war, thus disable himself? Of this we have no doubt. What did he undertake, what did he agree to do, by that enlistment? In what situation did he place himself? He placed himself in the service of the government of the *United States*, and agreed, yes, legally bound himself, to leave, not only the county of *Vigo*, but the State of *Indiana*, and remain absent, if required, for three years, devoting his entire time to the service of the *United States* in parts remote from the State of *Indiana*. This, we judicially know, because we know that the government was not enlisting soldiers to serve in *Vigo* county, nor in the State of

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Indiana; for there was no rebellion existing within those limits to be put down by an army. *Allen* not only undertook to leave the State, and did leave it, but he further deprived himself of the power to return, of his own volition, for a period of three years. The soldiers, as we judicially know, were enlisted for the war which was being carried on in the Southern States; and while we concede the nobleness and patriotism of the spirit which prompted the defendant to enlist, still, we can not allow such considerations to control in the decision of a question of law. Legal decisions should not rest upon the impulses of the hour, but upon principles of perpetual application. The proper way to test the decision in this case is to turn ourselves back to a period prior to this war, and to suppose an officer to be recruiting for the regular army; to suppose further, that *Allen*, then the auditor of *Vigo* county, enlists for three or five years in that army and is marched off to a frontier military post of the *United States*; would any body say, in that case, that he had not abandoned the office of county auditor? Such, in law, is this case. See *Kerr v. Jones*, 19 Ind. 351. It could make no difference that *Allen* should afterwards, and before the expiration of the term of his enlistment, get released therefrom, that fact being a mere accident; the vacancy having once become complete by abandonment, could not be refilled by an accidental, voluntary or forcible re-occupancy. See *Rex v. Harris*, 4 Barn. and Ad. 936; *Page v. Hardin*, 8 B. Mon. 648; Ang. and Am. on Corp. §§ 433 and 434; Abb. Dig. p. 204, §§ 49 and 50. If *Cornwell* was elected, *Allen* having vacated the office, he was elected for the term of four years. *Nelson v. The Governor*, 6 Ind. 496.

If public policy should have anything to do in establishing the principle of decision touching the discharge of their duties by public officers, that policy would require that they

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should be held to a strict, not a lax, negligent habit of attention.

The act of 1861, (acts of 1861, p. 40,) allowing officers, who enlist in the army, to severally retain their offices, if they desire to, and to occupy them by deputy, is referred to. We doubt the consistency of that act with the Constitution, as applicable to county Auditors, but we need not decide the point here, as *Allen* did not attempt to avail himself of the statute, by acting under it. It does not appear that he appointed any deputy.

Per Curiam.—The judgment below is reversed, with costs. Cause remanded, with instruction to the Court below to overrule the demurrer to the complaint.

There was filed herein a motion for a rehearing, by the appellee, which was overruled by the Court, and thereupon the following additional opinion was rendered by—

PERKINS, J.—The appellee has filed a petition for a rehearing, in this case, on the ground that the appeal was prematurely taken, and the case, therefore, not properly before the Court. It was conceded, in the opinion given, that the appeal was prematurely taken; but, on the filing of the petition for rehearing, we again inspected the record with care, and are satisfied that we erred in our statement, on this point, in the original opinion.

The record shows these facts: At the *December* term, 1862, of the *Vigo* Common Pleas, *Allen* demurred to the complaint of the plaintiff, the demurrer was sustained, the plaintiff appealed to the Supreme Court, and filed an appeal-bond, which recited, that "judgment was rendered by the said Court against the said plaintiff, and in favor of the said defendant, this 30th day of *December*, 1862, from which judgment the said plaintiff has appealed," &c.

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But the clerk did not enter a final judgment on the ruling upon demurrer.

The record further shows, that, afterwards, the plaintiff moved, on notice to the defendant, for a *nunc pro tunc* entry of such final judgment, and that, at the *August* term, 1863, "the Court being advised, it is ordered that the record be amended, and that final judgment be rendered, in this case, as asked for in said motion, on the ruling of the Court, at its *December* term, 1862, upon the demurrer to the last amended complaint, *nunc pro tunc*, as follows, to-wit: It is considered by the Court, that the plaintiff take nothing by his suit, and that the defendant go hence," &c.

Thus the final judgment of the Court is rendered as of the *December* term, 1862.

What misled us in the original opinion, was the explanation which the Court below appended to the judgment, and which we copied, as to the consideration, by which it was influenced in rendering the judgment; but we are satisfied that that explanation does not avoid the judgment, so as to render an appeal inoperative.

The petition for rehearing is overruled.

Smith & Mack, Voorhees & Risley, and McDonald & Roache, for the appellant.

R. W. Thompson, B. B. Moffatt, H. D. Scott, and Newcomb & Tarkington, for the appellee.

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Held, 1. That the demurrer by *A* and wife to the first paragraph of *B*'s answer herein admits the ownership by *A* of the notes herein sued on, as alleged in said paragraph.—*Schoppenhast v. Bollman and Wife*, 280
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3. *Held*, 3. That where the defendant in attachment, in the main action, is personally served with process, the attachment is not the

foundation of the jurisdiction, and, in such case, if the attachment illegally issues, it is the privilege of the defendant alone to take advantage of it. *Ibid.*

4. *Held*, 4. That where the proceeding is *ex parte*, without personal service upon or appearance by the defendant, the jurisdiction is acquired over him only by an attachment of his property, and, if the latter illegally issues, the proceedings under it will be void, and, in the latter case, the garnishee is therefore interested to know that the jurisdiction has duly attached, but has no right further to interfere in the proceeding, and he is not responsible for the regularity of the proceeding in the main action. *Ibid.*

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BANKS—BANK OFFICERS.

1. BANKS—CASHIER—POWER OF.—The cashier of a bank is generally, by virtue of his office, entrusted with the notes, securities and other funds of the bank, and is held out to the world, by the bank, as its general agent in the negotiation, management and disposal of them, and, *prima facie*, he must be deemed to have authority to

transfer and indorse negotiable securities, held by the bank, for its use; and the purchaser thereof, in good faith, from the cashier, without notice of any special limitation of his power to transfer and indorse such paper, will acquire perfect title thereto, and the indorsement thereof, as cashier, will bind the bank.—*The Bank of the State v. Wheeler*, 90

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4. **SAME.**—*Semble*, that municipal corporations can not tax bank stock owned by non-residents of the city, because such stock can have no location or *situs* other than the domicile of the owner. *Ibid.*
5. **SAME—UNITED STATES STOCKS.**—*Semble*, also, that the bonds and stocks of the *United States* can not be taxed under State authority. *Ibid.*
6. **SAME.**—But, *quære*, whether a bank, organized under the general banking law of *Indiana*, can legally divert her capital from the business for which the corporation was created, and invest it in *United States* stocks, and thus deprive the State of any revenue therefrom. *Ibid.*

BASTARDY.

1. **BASTARDY—ACTION.**—An agreement and admission by the mother of a bastard child, that provision for the maintenance of the child has been made to her satisfaction, will not bar an action by her, for such maintenance, against the father of the child, unless such agreement and admission are entered of record with the consent of the mother, and the mere fact that she filed her agreement and admission in Court, is not sufficient to bar her right of action.—*The State ex rel. &c. v. Wilson*, 273

BILL OF EXCEPTIONS.

1. **PRACTICE—BILL OF EXCEPTIONS.**—In a bill of exceptions, the words, "the foregoing was all the evidence given in the case," are not sufficient, under rule 30 of this Court, to exclude the presumption of other evidence.—*Ford v. Mitchell*, 54

BILLS OF EXCHANGE.

See PROMISSORY NOTES. CONTRACTS, 4.

1. **PROMISSORY NOTES—LIABILITY OF INDORSERS.**—Where *A* draws a bill of exchange on *B*, (who accepts it,) payable to the order of *C*, who indorses it to *D*, and *D* indorses it back to *C*, the latter can maintain no action thereon against *D*.—*Palmer et al. v. Whitney, &c.*, 58
2. **SAME.**—But where *A* draws a bill of exchange on *B*, (who accepts it,) payable to the order of *C*, who indorses it to *D*, who indorses it back to *C*, all on the day of its date, and the latter, before its maturity, indorses it, and procures it to be discounted, on his own account, by a bank, such bank may maintain an action upon it against *D*; because, in the latter case, the transaction imports, upon its face, that the subsequent indorsement was made for the accommodation of the prior indorser, *C*. *Ibid.*
3. **SAME—NOTICE OF PROTEST.**—It is enough to bind the indorser, if the holder of a bill make diligent inquiry for the indorser, and act upon the best information he can procure. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interests depend upon obtaining correct information. *Ibid.*
4. **SAME.**—Where a bank, discounting a note or bill, inquires of the person presenting it as to the residence of the indorser, and sends notice to the place named by him, this is due diligence, and sufficient to charge the indorser, though he never resided there, or had removed to another place. *Ibid.*
5. **NOTARY, NOTICE BY.**—A notary, in giving notice of protest, does not act officially, but as the agent of the holder of the bill, and, therefore, his signature to the notice, without attestation by his seal of office, is sufficient. *Ibid.*

BONDS.

See RECOGNIZANCE, 1.

1. **BONDS OF EXECUTORS AND ADMINISTRATORS.**—The bond given by an administrator, upon his appointment, (under section 19, 2 G. & H. p. 489,) is designed alone to secure the faithful administration of the personal property of his intestate, and the proceeds of the sale of such real estate as shall be sold in pursuance of the terms of a will, and such bond can cover only breaches of that trust.—*Worgang's Adm'r v. Clipp et al.*, 119
2. **BOND ON SALE OF REAL ESTATE BY SAME.**—But if, in the course of the settlement of an estate, it becomes necessary to sell other real estate, and an additional bond is then given, (under section 82,

2 G. & H. p. 510,) the latter bond is designed only to secure the faithful discharge of the new duties thus imposed upon him, and the bond so given can only cover the neglect of duty in the administration of the proceeds of such real estate. *Ibid.*

3. GUARDIAN AND WARD—BOND.—The additional bond given by a guardian, in an application to sell the real estate of his ward, under § 18, 2 G. & H. 571, is not discharged by the fact that, on reporting the sale of the real estate, he produced the proceeds of the sale in Court and then withdrew them by order of the Court.—*The State ex rel., &c. v. Steele*, 207
4. SAME.—Such a bond is not merely subsidiary to the original bond given by the guardian, but is an independent undertaking, and can only be discharged by the actual payment of the moneys arising from the sale of the real estate, according to law, to the ward, or other person entitled to receive the same, and suit may be instituted upon such bond whenever it is broken, without first resorting to the original bond. *Ibid.*

CASES DOUBTED, &c.

1. CASE DOUBTED.—The case of *Cromwell v. Wilkinson*, 18 Ind. 365, as to effect of remission by the plaintiff of a part of the damages recovered, is left open for reconsideration.—*Carmichael v. Shiel*, 66

CASES OVERRULED.

1. OVERRULED CASES.—The case of *Willard v. The State*, 4 Ind. 407, so far as it is inconsistent with the decision herein, is overruled.—*Struckman v. The State*, 160
2. The case of *Miller v. Blackburn*, 14 Ind. 62, distinguished from *Standeford v. Devo*, 404
3. CASES OVERRULED.—The cases of *Wells v. Jackson*, 6 Blackf. 40; *Early v. Foster*, 7 *id.* 35; *Harris v. Pierce*, 6 Ind. 162; *Cecil v. Mix*, *id.* 478; *Snyder v. Oatman*, 16 *id.* 265, and *Sill v. Leslie*, *id.* 236, so far as they are inconsistent with the decision in this case, are overruled.—*Drake v. Markle*, 433

CHAMPERTY.

1. CHAMPERTY.—The purchase of land, pending a suit concerning it, is champerty, and the purchase is void, if made with a knowledge of the suit, and not in consummation of a previous bargain.—*West v. Raymond*, 305
2. ATTORNEY—CONTRACT.—The purchase by an attorney from his client, pending litigation, of the subject matter of the litigation, is absolutely void. *Ibid.*

3. PROSECUTION OF CLAIMS AGAINST GOVERNMENT.—A claimant against the government has a clear right to appear in person or by attorney, before a legislative committee, to openly and fairly present the facts and arguments upon which he relies for recovery.—*Coquillard's Adm'r v. Bearss et al.*, 479
4. SAME.—But it is against public policy and unlawful to present such facts and arguments secretly, or to resort to “log rolling,” and to deceit, or undue means, or bribery, or other corrupting influences, in order to secure desired legislation. *Ibid.*
5. SAME—CHAMPERTY.—A contract to prosecute a claim against the government, for another person, and pay all expenses, and to receive, as compensation therefor, a certain portion of the amount recovered, if successful, and nothing if not successful, is champertous and wholly void. *Ibid.*

CITY.

1. TAXATION—CONSTRUCTION.—The provisions of a municipal charter, in reference to the mode of assessing and collecting taxes, must be substantially pursued, or the tax will be invalid, and can not be legally collected.—*Powell v. The City of Madison*, 335

CITY OF MADISON.

See TAXATION, 2, 6, 7.

CLERK—DUTIES OF.

1. EXECUTION—CLERK.—Where, in the entry of a judgment, by agreement of the parties, it is ordered by the Court that an execution shall issue thereon, but shall not be levied of the defendant's property for a specific period, except in a certain event, it does not thereby become the duty of the Clerk to issue such execution without directions so to do from the plaintiff, his agent or attorney.—*The State ex rel., &c. v. Wilkin's Adm'r*, 216

COMMITTEE.

1. GUARDIAN—COMMITTEE.—A general guardian of an insane person, under our statutes, is substantially the committee of such person, and is the proper party to appear for her without any special order of the Court.—*Symmes v. Major*, 443

COMMON CARRIERS.

1. COMMON CARRIERS, DELIVERY TO.—The mere fact that goods were delivered to and received by the deck hands of a steamboat is not sufficient to charge the owners as common carriers, unless it be

shown that such persons were authorized to receive freight, or that the same was delivered to them in pursuance of some special contract or usage; and, in a given case, otherwise fully established, it will not be sufficient to remove the necessity for such proof for the Court or jury to find that the manner of the reception of the freight by the deck hands was such that the officers, whose duty it was to receive goods for transportation, must, if they had exercised reasonable attention, care and diligence, have known that the freight was in the boat, and have received it.—*Ford v. Mitchell*, 54

COMMON SCHOOLS.

See SCHOOLS, 1.

CONSIDERATION.

See CONTRACTS, 25.

1. CONSIDERATION—PRE-EXISTING DEBT.—A pre-existing debt is a valuable consideration to support a conveyance.—*Aiken v. Bruen*, 137

CONSTITUTIONAL LAW.

See PRESIDENT UNITED STATES, 1, 2. HABEAS CORPUS, 1.

1. CONSTITUTIONAL LAW—OFFICIAL BONDS.—The act of December 21, 1858, (Acts Special Session 1858, p. 39,) is applicable as well to official bonds executed before as after its date, and effects only the remedy, and does not impair the obligation of such contracts, and is therefore constitutional.—*Pierce v. Mills*, 27
2. SERVICES—CONSTITUTIONAL LAW.—Officers take their offices *cum onere*, and services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services, and this construction involves no violation of sec. 21, article 1, constitution of *Indiana*.—*The Board, &c., of Miami Co. v. Blake*, 32
3. CONTRACT—SHERIFFS' SALES—APPRAISEMENT—MERGER.—Promissory note executed in 1840, prior to the existence of any law on the subject of appraisement in *Indiana*. Judgment was recovered thereon in 1845, after the taking effect of such a law, but the judgment was silent as to the mode of its collection, and it was not required, by any law then in force, to specify the manner of its collection. Real estate was afterwards sold on execution, without appraisement, to satisfy the judgment, notwithstanding the law, in force at the date of the judgment and sale, required appraisement. *Held*, 1. That, as the law in force at the date of the contract did not require any appraisement, the plaintiff in the judgment had the constitutional right to have it collected on execution, without appraisement.—*Rawley v. Hooker*, 144

4. *Held*, 2. That the act of *February* 11, 1843, so far as it attempts, in this respect, to control the enforcement of contracts, executed before its passage, is unconstitutional and void. *Ibid.*
5. JURISDICTION—PERSONAL JUDGMENT—ALIMONY.—It is competent for the Legislature to authorize the courts of the State to render personal judgments for alimony, in divorce cases, upon constructive notice, against citizens of the State, but it can not authorize such judgments, upon such notice, against the citizens of another State, unless the latter submit to the jurisdiction of our courts by voluntarily appearing to such actions therein.—*Beard v. Beard*, 321
6. STATUTES CONSTRUED—CONSTITUTIONAL LAW.—The act of Congress of *March* 3d, 1863, assuming to indemnify against certain arrests, is unconstitutional.—*Griffin v. Wilcox*, 370
7. CONSTITUTIONAL LAW.—*Seem*, that the act of *May* 11, 1861, (Acts Spec. Sess. 1861, p. 40,) so far as it undertakes to empower county auditors to enter the military service of the *United States*, and discharge the duties of their civil offices by deputies alone, is unconstitutional.—*The State, &c. v. Allen*, 516

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CONTINUANCE.

1. CONTINUANCE.—An affidavit for a continuance, in which the affiant can not state the name of witnesses he wants, nor where they reside, or can be found, is insufficient.—*Webb v. The State*, 236

CONTRACTS.

See EXPRESS COMPANIES, 1. PRACTICE, 8. SHERIFF, 2, 3, 4, 5, 6, 7. PROMISSORY NOTES, 9. LANDLORD AND TENANT, 1, 2. CHAMPERTY, 4, 5.

1. CONTRACT—PAYMENT—PLEADING.—*A* recovered a judgment against a county, and a few days thereafter the county auditor issued county orders to pay the judgment, and delivered them to *A*, who received them in payment and satisfaction of the judgment. The judgment was afterwards reviewed and reversed, and a new trial ordered. *A* then pleaded the facts aforesaid, as equivalent to a voluntary payment and discharge of the judgment by the county, and as a bar to a re-trial.

Held, That the auditor had no power to contract that said orders should be received in payment and satisfaction of said judgment, and that their delivery as aforesaid did not amount to payment, and constituted no bar to the re-trial of the cause.—*Chapin v. The Board of Commissioners of Steuben County*, 12

2. RAILROADS—LIABILITY—EXEMPTION.—Where a person, traveling on a railroad, receives from the company a free pass, upon which is indorsed a statement, that "it is agreed that the person accepting this ticket, assumes all risk of personal injury, and loss or damage to property, whilst using the same on the trains of the company," such indorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; and it would seem that such agreement does not cast upon such person any risks arising from any negligence of the servants of the railroad company in running the trains.—*The Indiana Central R. R. Co. v. Mundy*, 48

3. COMMON CARRIERS, DELIVERY TO.—The mere fact that goods were delivered to and received by the deck hands of a steamboat, is not sufficient to charge the owners as common carriers, unless it be shown that such persons were authorized to receive freight, or that the same was delivered to them in pursuance of some special contract or usage; and, in a given case, otherwise fully established, it will not be sufficient to remove the necessity for such proof for the Court or jury to find that the manner of the reception of the freight by the deck hands was such that the officers, whose duty it was to receive goods for transportation, must, if they had exercised reasonable attention, care and diligence, have known that the freight was in the boat, and have received it.—*Ford v. Mitchell*, 54

4. BANKS—CASHIER—POWER OF.—The cashier of a bank is generally, by virtue of his office, entrusted with the notes, securities, and other funds of the bank, and is held out to the world, by the bank, as its general agent, in the negotiation, management and disposal of them, and, *prima facie*, he must be deemed to have authority to

transfer and indorse negotiable securities, held by the bank, for its use; and the purchaser thereof, in good faith, from the cashier, without notice of any special limitation of his power to transfer and indorse such paper, will acquire perfect title thereto, and his indorsement thereof, as cashier, will bind the bank.—*The Bank of the State v. Wheeler*, 90

5. PROMISSORY NOTES—CONTRACTS.—*A* held the promissory note of *B* for 100 dollars, dated *September* 20th, 1854, due in six months. An agreement was made between *A*, of the one part, and *C*, *D* and *E*, of the other, by which the latter agreed to pay certain debts of *A*, for which *A* transferred to them certain property, including said note, of which a schedule was made, in which it was stated that the note was assigned to them without recourse on *A*. One of said assignees afterwards transferred the note to *F*, who probably knew that the assignment by *A* was without recourse. After the note was transferred to *F*, *A* indorsed it, but without consideration. Due diligence was used to collect the note of *B*.
Held, 1. That if the indorsement of the note by *A*, and the execution of the assignment, as stated in the schedule, without recourse on him, were concurrent acts, they should be construed together, as constituting but one contract, which contract, so construed, exempts *A* from further liability.—*Collier v. Mahan*, 110
6. *Held*, 2. But, if the indorsement by *A* was made after the note came into the possession of *F*, *A* is not liable thereon, because his indorsement was without consideration. *Ibid*
7. STATUTE OF FRAUDS—CONTRACT.—*A* contract, whereby *A* sold a horse to *B*, and warranted that it should be sound for one year thereafter, and agreed, that, if, after the expiration of one year, the horse should prove unsound, he would take it back and pay the plaintiff 100 dollars, is within the statute of frauds, and not operative against *A*, unless in writing. 1 G. & H. 348, 5th subsection of sec. 1.—*Shipley v. Patton's Adm'r*, 169
8. CONTRACT—DAMAGES.—In an action upon a building contract, for extra work, the measure of damages is the price agreed upon, or, if there was no such agreement, then the reasonable value of the work, unless the extra work were done under the original contract, when the rule might be different.—*Street v. Swain*, 203
9. CONTRACT—HOGS.—Where a contract is made for the delivery of a certain number of a particular lot of hogs, it can not be discharged by the delivery of the like number of any other hogs, although of equal quality and weight, unless performance, in this respect, is waived by the parties.—*Lowry v. Cooper*, 269
10. CONTRACT—PAROL EVIDENCE.—*A* is embarrassed. *B*, his son, is willing to aid him in the adjustment of his indebtedness. He has

some claims upon the Government for supplies furnished, but they are not yet finally adjusted and allowed. One of them was for 1,165 dollars. *B* therefore constitutes *C* his agent, to aid in the settlement of his father's liabilities, and transfers to him said claims, and instructs him, that, if such of his father's creditors, as he shall designate, will surrender their claims in lieu thereof, and wait the payment of the Government claims, he will allow them principal and interest to date. What designation of creditors was made, does not appear. Many claims against *A* were filed with *C*, to be adjusted in the manner proposed by *B*. *E*, who filed the first three claims, received from *C* a receipt, in which they are fully described, and in which, after describing them, he adds, "to be paid out of the proceeds of an account of *F* and *G* for 1,165 dollars, for goods furnished the Government for the use of the *Oregon* volunteers in the *Jakina* Indian war, when collected by the undersigned, who holds a power of attorney for that purpose." Signed by *C*, in his individual name, and not as agent. The Government claims, left with *C*, were not sufficient to pay all the liabilities of *A*, to the extent proposed by *B*. *C* collected on the claim for 1,165 dollars, the sum of 776 dollars and 67 cents, in gold. *E* then assigned said receipt to *G*, who sued *C* upon the same, and demanded judgment for the said 776 dollars and 67 cents, and recovered.

Held, 1. That said receipt is assignable in equity, so as to enable the assignee to maintain an action upon it in his own name.—*McKernan v. Mayhew*, 292

11. *Held*, 2. That it would be error, in the action upon said receipt, to allow *C* to aver or prove, that, notwithstanding his agreement stated in said receipt, the understanding between him and said assignor, at the date of said receipt, was, that said payment should be made *pro rata*, with all the claims filed against *A*, out of the aggregate amount, which should be collected on all said Government claims by *C*, as agent of *B*. Said receipt contains a contract which can not be altered by parol evidence, and creates a personal liability against *C*, for the amount collected on said claim for 1,165 dollars. *Ibid*.

12. RAILROADS—CONTRACT.—Subscription to the capital stock of railroad companies, made since the taking effect of the act of *February* 23, 1853, authorizing the consolidation of such companies, will not be discharged or invalidated by the subsequent consolidation of the company in which they are made, but they will be held to have been made with reference to said law.—*Bish et al. v. Johnson et al.*, 299

13. ATTORNEY—CONTRACT.—The purchase by an attorney from his client, pending litigation, of the subject matter of the litigation, is absolutely void.—*West v. Raymond*, 305

14. CHAMPERTY.—The purchase of land, pending a suit concerning

it, is champerty, and the purchase is void, if made with a knowledge of the suit, and not in consummation of a previous bargain.

Ibid.

15. INSTRUCTIONS TO JURY—CONTRACT.—Action by *A* against the estate of *B*, her father, on a note for 1,000 dollars, given by him in his lifetime, payable to her at his death. Answer, first, want of consideration, and second, that the note was given in consideration of *A*'s agreement to live with and keep house for her father, during his life, which she failed to do. Issues. Trial by jury. It appeared that she resided with, and kept house for, her father, six or seven years after her majority, and, when the note was given, in 1860, she agreed not to marry, but to take care of him during his life. She did not marry. The evidence was conflicting as to the amount and kind of services rendered by her for him, and as to the precise terms of their contract.

Held, 1. That, under the circumstances, the following instruction was proper: "If the note was executed in consideration that *A* should live with and keep house for her father during his life, and she, without sufficient cause given by him, or without his consent, left his service before his death, she would be entitled to recover the reasonable value of her service while she lived with him. But, if she left his service, with his consent, not obtained through her own misconduct, some time after the execution of the note, and no effort was made by him to recover possession of the note, or correct it, the jury will be authorized, in the absence of any evidence tending to show an abandonment of the contract, to find that it still existed, and that he waived the further performance of it on her part, and she will be entitled to recover the whole amount."—*Pitts' Adm'r v. Pitts*, 309

16. *Held*, 2. That the following also is correct: "If *A*, after her majority, continued to live with her father, as she had done previously, with no new duties or responsibilities, and was provided with necessities, &c., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between them, before these services were rendered, that she should receive such compensation, and, if the note was given for such past services, and there was no such understanding between them, she can not recover. But, if the note was given for such past services, the fact that it was given, will raise a presumption that there had been a previous understanding between them, that such compensation should be made, and, unless such presumption is overcome by evidence, that no such understanding existed, she will be entitled to recover." *Ibid.*

17. PROMISSORY NOTES—WARRANTY.—The person who sells promissory notes, whether by indorsement or delivery without indorsement, warrants them to be genuine, and not forgeries.—*Bell v. Caferty*, 411

18. **CONTRACTS—SALE—FRAUD.**—Where a person sells personal property, and the vendee pays therefor, by transferring to the vendor forged promissory notes, knowing them to be forged, such sale will not be rendered absolutely void by such fraud, but only voidable. *Ibid.*
19. **CONTRACTS—RESCISSION OF.**—In such case, whether the fraud amount to a crime or not, the vendor, being himself innocent, still has the right to avoid or affirm the sale, upon the discovery of the fraud, so long as the property remains in the possession of the vendee, or a purchaser from him with notice. *Ibid.*
20. **SAME—SALE.**—But, where there has been a sale and delivery under it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor. *Ibid.*
21. **TENDER—TIME OF.**—Where the time and place of delivery are fixed by the contract, a tender of the property to be delivered, to be valid, must be made a reasonable time before sunset on the given day, and must be continued until that time, unless the party, who is to receive the property tendered, appear sooner, and if he be present, a tender to him at any time on the day is good.—*Larimore v. Hornbaker*, 430
22. **CONTRACT—CONSTRUCTION.**—A large part of the opinion herein relates to the construction of a contract, which can not be briefly stated. See opinion. *Ibid.*
23. **CONTRACT—FRAUD.**—Executed contracts, made to hinder, delay, and defraud creditors, although void as to creditors, are binding upon the parties themselves; but executory contracts, made for the same purpose are void, both as to creditors and between the parties, and will not be enforced.—*Welby v. Armstrong*, 489
24. **CONTRACT—CONSIDERATION.**—Where an instrument is executed as a contract, between private parties, acknowledging the receipt of the consideration, whether it be money, or specific articles, or a promise or undertaking to be executed by one party, it may be shown, in bar of a suit on such instrument, that the consideration was not received; and no recitals in such instrument will estop the party interested to plead the want or failure of consideration.—*The City of Aurora v. Cobb*, 492

COSTS.

1. **COSTS IN CRIMINAL CASES.**—In criminal cases, county officers are not entitled to recover any costs against the State or county where the defendants are either acquitted, or discharged upon *nolle prosequi*, and in cases of conviction they can only recover of the persons convicted.—*The Board, &c., of Miami Co. v. Blake*, 32

2. **STATUTES CONSTRUED—COSTS.**—Under section 25, 1 G. & H. p. 338, so far as the recovery of costs is concerned, a discharge upon *nolle prosequi* shall be deemed an acquittal. *Ibid.*
3. **COSTS—PRACTICE—PRESUMPTION.**—In an action to recover damages for a nuisance in erecting a mill dam, and to abate the same, where the plaintiff alleged in his complaint that he was the owner in fee and in possession of the land, proof of possession alone would entitle him to recover damages, and, where, in such action, he recovered judgment for 1 dollar and damages, and the like amount of costs, and failed to obtain an order for the abatement of the nuisance, or show himself entitled thereto, this Court will presume in favor of the correctness of the judgment below, and that the title to the premises did not come in question.—*Barber v. Barber*, 468

COURTS.

See **TERMS OF COURTS**, 1. See **RECOGNIZANCE**, 1. **PRACTICE**, 43.

CRIMINAL LAW AND PRACTICE.

See **RECOGNIZANCE**, 1. **PROVOST MARSHAL**, 2.

1. **PROVOST MARSHAL—ARREST.**—A deputy Provost Marshal, directed by his superior military officer to arrest and send to headquarters all persons engaged in stealing, concealing, or preventing the delivery of any government property, or any property to which the *United States* have any just claim, in any county of this State, can not, upon his own motion, and without proper legal process under the laws of *Indiana*, arrest and imprison any citizen upon suspicion that he has committed some crime; and any person so arrested and confined, may be discharged therefrom by the judge of any Court of competent jurisdiction, under the writ of *habeas corpus*.—*Skeen v. Monkeimer*, 1
2. **CRIMINAL LAW AND PRACTICE—EVIDENCE.**—In justifying a homicide in defence of person, property, &c., it is competent for the defendant to give in evidence any facts tending to show the character of the attack he resisted, the intention with which it was made, and that he had reasonable grounds to believe it was necessary to do what he did in resisting it, and to this end he may show the relations that had existed between himself and the deceased for an indefinite period before the killing.—*DeForest v. The State*, 23
3. **SELF-DEFENCE.**—If a man, on returning to his own house find himself barred out and excluded therefrom by another, and then repeatedly demands, and is denied admission, he has a legal right to break in the door; and if he encounter resistance on thus entering, and be first stricken by the unlawful occupant with a deadly weapon, and then, meeting force with force, he take the life of such occupant, such killing would seem to be excusable homicide, committed in self-defence. *Ibid.*

4. **COSTS IN CRIMINAL CASES.**—In criminal cases, county officers are not entitled to recover any costs against the State or county where the defendants are either acquitted, or discharged upon *nolle prosequi*, and in cases of conviction they can only recover of the persons convicted.—*The Board, &c., of Miami Co. v. Blake*, 32
5. **STATUTES CONSTRUED—COSTS.**—Under sec. 25, 1 G. & H. p. 338, so far as the recovery of costs is concerned, a discharge upon *nolle prosequi* shall be deemed an acquittal. *Ibid.*
6. **CRIMINAL LAW AND PRACTICE.**—A criminal prosecution upon indictment will be held erroneous where the record fails to show that the indictment was duly returned by the grand jury in open Court.—*Jackson v. The State*, 79
7. **INFORMATION.**—In an information for retailing intoxicating liquors, it is not sufficient to aver that the defendant, on, &c., at, &c., "did sell for five cents to one B one gill of intoxicating liquors," without license, &c., but it should affirmatively appear that the quantity sold was less than one quart.—*Struckman v. The State*, 169
8. **GRAND JURY.**—The record, on appeal in a criminal case upon indictment, should show that a grand jury was duly impannelled, and that the indictment was duly found by such jury, and returned by them into Court.—*Jackson v. The State*, 171
9. **"BANK BILLS"—"BANK NOTES."**—The terms "bank bills" and "bank notes," are synonymous in their popular sense, and, under §§ 48 and 49, 2 G. & H. 403, they must be held to be identical in their legal signification.—*The State v. Hays*, 176
10. **INDICTMENT.**—An indictment which describes the property stolen as "three bank bills of the description and denomination following, viz: one five dollar bank bill on the *Hartford Bank of Connecticut*, of the value of five dollars," &c., is sufficient as the description of the property. *Ibid.*
11. **MALICIOUS TRESPASS.**—For a sufficient form for an information for malicious trespass, see the opinion.—*The State v. Williams*, 206
12. **SURETY OF THE PEACE.**—As to what will constitute a sufficient affidavit for surety of the peace, see the opinion.—*Beckwith v. The State*, 225
13. **EVIDENCE.**—On the trial of an indictment for retailing without license, it is error to allow the State to prove, that, in an adjoining room to that in which the liquor was sold, the defendant kept a billiard table.—*Sowle v. The State*, 236
14. **AFFIDAVIT—LARCENY.**—An affidavit is substantially good, which charges that the defendant, "on, &c., at, &c., did feloniously steal, take away, lead, ride, and drive away, one dun-colored horse," &c.—*Webb v. The State*, 236

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15. RECORD ON APPEAL—GRAND JURY.—The record on appeal, in a criminal case, tried on indictment, must show that the grand jury was regularly empannelled, and the indictment duly returned by them in open Court.—*Hall v. The State*, 268
16. RETAILING.—An information for retailing, without license, is not sufficient if it merely aver the sale of one pint of whisky, without averring that it was sold in a less quantity than a quart.—*Wood v. The State*, 276
17. STATUTES CONSTRUED—SUNDAY.—The temperance law of 1859 prescribes no penalty against the sale of intoxicating liquors, in quantities of one quart or more, on Sunday. *Ibid.*
18. TITLE OF COURT.—In an information, the statement in the caption of the title of the Court to which the information is presented is sufficient, without naming the county.—*The State v. Mathis*, 277
19. PUBLIC STREET.—A public street in a town or city is a public highway, and it is sufficient in an information to describe it as a public street. *Ibid.*
20. LOST INDICTMENT, &c.—In a criminal prosecution on appeal, where the clerk returns to a *certiorari*, that the papers are lost and copies of the indictment or information can not be given, the judgment below will be reversed by this Court.—*Hitchcock v. The State*, 279
21. MARRIED WOMEN—CRIMINAL LAW AND PRACTICE.—The wearing apparel of a married woman, furnished by her husband as a marital duty, remains his personal property during his life, and he can sell it or give it away during that period, but she may retain such as she may have at his death as her paraphernalia; and an indictment, for the stealing of such apparel, during the husband's life, charging it to be the property of the wife, can not be sustained.—*The State v. Hays*, 288
22. CHARACTER—EVIDENCE.—In a criminal trial upon indictment, after the State has introduced her testimony, and the defendant has introduced his, but has not attempted to impeach the witnesses produced by the State, it would be error to allow the State to introduce testimony as to the general moral character, or standing for integrity, of its witnesses. The character of a witness is presumed to be good until impeached.—*Johnson v. The State*, 329
23. INFORMATION FOR FELONY IN COMMON PLEAS.—An information for a felony must show that the felony, on a charge of which the defendant is alleged to be in custody, is the same felony for which the information is filed.—*Broadhurst v. The State*, 333
24. CRIMINAL LAW AND PRACTICE.—For the requisite averments in an indictment for assault and battery with intent to commit a felony, see the opinion at length.—*The State v. Murphy*, 441

25. SAME.—In an information for assault and battery, it should be averred that the offence was committed in an unlawful manner.

Ibid.

26. INFORMATION FOR OBSTRUCTING PROCESS.—For a sufficient form of information, for obstructing the execution of criminal process, see the opinion.—*The State v. Gilbert*, 474

DAMAGES.

1. DAMAGES.—In action for civil damages, for an assault and battery, the jury, in assessing the damages, may consider the injury inflicted on the plaintiff by the blow given by the defendant, the expense incurred, loss of time, of hearing, of his peace of mind, and individual happiness, occasioned by the injury received.—*Cox v. Vanderkleed*, 164

2. CONTRACT—DAMAGES.—In an action upon a building contract, for extra work, the measure of damages is the price agreed upon, or, if there was no such agreement, then the reasonable value of the work, unless the extra work were done under the original contract, when the rule might be different.—*Street v. Swain*, 203.

3. MEASURE OF DAMAGES.—In an action upon a replevin-bond, to recover the value of chattels wrongfully replevied, the measure of damages is the value of the goods, and not the price at which the defendant may have sold them.—*Schrader v. Woffin*, 238

4. DAMAGES.—The right to damages to be recovered in civil actions of false imprisonment, is property, is a chose in action, and passes, in this State, to one's personal representatives at his death.—*Griffin v. Wilcox*, 370

DECEDENT'S ESTATES.

See JURISDICTION, 1, 2. See EXECUTORS AND ADMINISTRATORS, 3.
BONDS, 1, 2.

DEMURRER.

See PRACTICE, 48, 49.

DEPOSITIONS.

1. DEPOSITIONS.—A deposition may be good in part, and bad in part.—*Estep v. Larsh*, 183

2. WITNESS.—Where the deposition of a witness is taken in a cause, and it is agreed by the parties, that the deposition shall be read upon the trial, at all events, without reference to the presence or absence of the witness at the time of the trial, it is not error to

admit the deposition in evidence, although the deponent had already been called and examined and cross-examined orally in the cause. *Ibid.*

3. WHEN TAKEN.—Depositions can not be taken during the term of the Court in which the cause is pending without the agreement of the parties, and, if taken without such agreement, they may be suppressed.—*Raymond v. Williams*, 241
4. NOTICE.—Where a notice to take depositions recites that the taking will be commenced on a certain day, and continued from day to day thereafter until completed, an adjournment for a longer time will be unauthorized, and will subject the depositions so taken to suppression, unless the opposite party appear and waive such objection. *Ibid.*

DISCONTINUANCE.

1. DISCONTINUANCE—WAIVER.—An appearance, after a discontinuance, waives it; and the taking of final judgment for the unanswered part of a cause of action, at any time during the term, will prevent a discontinuance, if such judgment be taken before the entry of judgment of discontinuance.—*McDougle et al. v. Gates et al.*, 65
2. DISCONTINUANCE—SPECIAL JUDGE.—When, under the provisions of sections 207 and 208 of the code, (2 G. & H. p. 154,) a judge, other than the regular judge of the Court, is called in by the regular judge, to try causes which he is incompetent to try, and such other judge fails to appear at the time designated for the trial of such causes, they are not thereby discontinued, but should be passed to, and continued upon, the general docket of the causes pending in said Court.—*Singleton v. Pidgeon*, 118

DISMISSAL.

1. PRACTICE—DISMISSAL.—Under §§ 363 and 365 of the code, (2 G. & H. 216,) a plaintiff may, at any time before the jury retire, or the finding of the Court is announced, dismiss his action, without prejudice; and a defendant, who has pleaded a set-off, must, as to that, be regarded as a plaintiff, and may, therefore, in like manner, dismiss as to his set-off.—*Crain v. Hilligross*, 210

DIVORCE.

1. JURISDICTION—PERSONAL JUDGMENT—ALIMONY.—It is competent for the Legislature to authorize the Courts of the State to render personal judgments for alimony, in divorce cases, upon constructive notice, against citizens of the State, but it can not authorize such judgments, upon such notice, against the citizens of another State, unless the latter submit to the jurisdiction of our Courts, by voluntarily appearing to such actions therein.—*Beard v. Beard*, 321

2. **SAME.**—If a resident of this State, whilst temporarily absent, is constructively notified of the pendency of such an action, such service is void, because the same should have been made by copy of process left at his last place of residence; but, if he is a non-resident, then no personal judgment for alimony, if rendered against him, will be operative or valid, unless made so by his voluntary appearance to the action. *Ibid.*

ESTOPPEL.

See WAIVER, 2. PLEADING, 31.

1. **ESTOPPEL.**—Representations, by the payer of a note, that it is valid, and he has no defence against it, made to a purchaser of such note after he has become the owner thereof, do not operate as an estoppel against the payer, nor can such representations, repeated by the purchaser thereof to any person to whom he may sell the same, have such effect in favor of such second purchaser.—*Windle v. Canady*, 248
2. **CONTRACT—CONSIDERATION.**—Where an instrument is executed as a contract, between private parties, acknowledging the receipt of the consideration, whether it be money, or specific articles, or a promise or undertaking to be executed by one party, it may be shown, in bar of a suit on such instrument, that the consideration was not received; and no recitals in such instrument will estop the party interested to plead the want or failure of consideration.—*The City of Aurora v. Cobb*, 492

EVIDENCE.

See CONTRACTS, 11, 25. PLEADING, 22, 23, 24, 26, 27.

1. **EVIDENCE OF CHARACTER.**—Mere contradiction among witnesses examined in Court, supplies no ground for admitting evidence of general character.—*Pruitt v Cox*, 15
2. **CRIMINAL LAW AND PRACTICE—EVIDENCE.**—In justifying a homicide in defence of person, property, &c., it is competent for the defendant to give in evidence any facts tending to show the character of the attack he resisted, the intention with which it was made, and that he had reasonable grounds to believe it was necessary to do what he did in resisting it, and to this end he may show the relations that had existed between himself and the deceased for an indefinite period before the killing.—*DeForest v. The State*, 23
3. **HUSBAND AND WIFE—ADMISSIONS.**—In an action by an administrator, on a note payable to his intestate, who, at its date, was a married woman, if failure of consideration, or other defence, is pleaded by the makers, the admissions of the payee of the note, whilst living, if they tended directly to benefit or injure herself, and only collaterally affected her husband, would be competent evidence for the defendants.—*Bevins v. Cline's Adm'r*, 37

4. Parol evidence is admissible to show that a written contract was made without consideration.—*Collier v. Mahan*, 110
5. EXECUTION—CHATTEL MORTGAGE.—Where personal property (mortgaged) continues in the possession of the mortgagor, and is taken in execution to pay his debt, it is incumbent on the mortgagee, in an action to recover the same, to show that the mortgage had been recorded within ten days after the execution thereof.—*Matlock's Adm'r v. Straughn*, 128
6. SHERIFF.—The sheriff, in order to determine the proper mode of sale, may examine the record of the judgment to ascertain the date of the contract, or may ascertain the same from evidence *de hors* the record, and the same evidence will be competent to sustain the validity of the sale in any action concerning the title so acquired.—*Rawley v. Hooker*, 144
7. TENDER—PRACTICE.—It is doubtful whether proof of tender is admissible under the general denial.—*Schrader v. Wolfst*, 238
8. SAME.—Where chattels have been wrongfully replevied from a sheriff, and the party replevying, in answer to an action on the replevin-bond, attempts to prove that, "after the dismissal of the replevin suit, he offered to return the chattels to the sheriff, which he refused to accept because instructed so to do by the attorney of the execution plaintiff," such proof is inadmissible, because insufficient to establish a legal tender. *Ibid.*
9. CRIMINAL LAW AND PRACTICE.—CHARACTER—EVIDENCE.—In a criminal trial upon indictment, after the State has introduced its testimony, and the defendant has introduced his, but has not attempted to impeach the witnesses produced by the State, it would be error to allow the State to introduce testimony as to the general moral character, or standing for integrity, of its witnesses. The character of a witness is presumed to be good until impeached.—*Johnson v. The State*, 329
10. ONUS PROBANDI.—A person who seeks the interposition of the Courts to avoid a sale of lands, except, perhaps, in the case of tax sales, assumes the *onus* of showing that he is entitled to the relief asked.—*Vail v. McKernan*, 421
11. EVIDENCE.—In such case, copies from the books of the Auditor of State, duly certified, would be legal evidence to show the condition of the account for principal and interest against the mortgagor. *Ibid.*
12. HUSBAND AND WIFE—EVIDENCE.—If husband and wife are jointly prosecuted in a civil action for the tort of the wife, in the alleged burning by her of a mill, it is competent for the plaintiff to prove, that, within a short period before, and just preceding the burning, the wife was heard to threaten, that "she would burn it; that she would put a torch to it; that it should not stand much

longer; that the old rattle-trap should be burned up," &c.—*Ball v. Bennett*, 427

13. **EVIDENCE—CONTRACT.**—In an action upon such a note, against the indorsers, as makers or otherwise, parol evidence is inadmissible to prove that they, by their indorsements, intended to assume any other relations to the paper than those of indorsers.—*Drake v. Markle*, 433

EXECUTION.

See PRACTICE, 8. CLERK, 1.

EXECUTORS AND ADMINISTRATORS.

1. **JURISDICTION—DECEDENT'S ESTATES.**—In an application by an administrator for an order to sell real estate, if the record show that the heirs were not otherwise notified of the pendency of the proceedings than by the appointment of a guardian *ad litem* for them, and citing him to appear and show cause why the property should not be sold, the Court would have no jurisdiction over them, and the proceeding as to them would be a nullity.—*Guy v. Pierson*, 19
2. **SAME—PRACTICE.**—In such a proceeding, if the record fail to name the heirs otherwise than by the general designation, "heirs," the proceeding will also be void as to them, and there could arise no presumption that the Court had acquired jurisdiction over any other persons than those named, and, in such case, the heirs could not prosecute an action for review of the proceeding, because they were not parties to it; but it would be otherwise if the proceedings had been against them as unknown heirs. ; *Ibid*.
3. **EXECUTORS AND ADMINISTRATORS—SALES OF REAL ESTATE BY.**—*A*, on August 13, 1850, caused the real estate owned by *B*, at his death, to be inventoried and appraised by competent persons, selected by him, who were first sworn, as required by law. *A* was, on the next day, duly appointed guardian of the heir at law of *B*, deceased, and gave bond and took the oath of office; and, on the latter day, filed his petition in the Probate Court, alleging the death of *B*, leaving a widow, and the heir at law aforesaid, and that after the death of *B*, he married the widow, who has since died intestate, and that no administration was ever granted on *B*'s estate, and that said estate is indebted to him in a large sum, and that he also expended a large sum in the support and education of his said ward, and that *B* left no personal property, but did leave the real estate inventoried and appraised as aforesaid, which it will be necessary to sell to pay the debts against his estate, &c., and for the maintenance and education of his said ward, and he filed the said inventory and appraisal with his petition. The prayer of the petition was, that *A* be appointed administrator of said estate, and for an

order to sell the real estate aforesaid at private sale, and that his ward be summoned, &c. The petition was verified. The Court thereupon appointed *A* administrator, and he was duly qualified as such. It was then shown that his ward was a non-resident of the State, and it was then ordered by the Court that he be notified of the pendency of the petition by publication, which was done. At the next term of said Court, the ward, failing to appear, was defaulted, and a guardian *ad litem* appointed for him, who answered. At the *February* term, in 1851, before any further proceedings were had, *A* was removed by the Court, upon the application of another creditor, and his letters of administration were annulled. *C* was then appointed administrator *de bonis non* of the estate of *B*, and filed his additional bond, as required prior to the sale of real estate, and then the Court, upon the original petition of *A*, ordered the real estate to be sold, at private sale, for the purposes therein indicated, and on terms prescribed by the Court. At the *August* term of said Court, in 1851, said administrator *de bonis non* reported that he had sold said real estate to *A*, for more than its appraised value, on the terms prescribed, and *A*, waiving the credit, paid the purchase-money, and the sale was duly reported to, and confirmed by, the Court, and a proper conveyance was executed and delivered to him therefor. The sale thus made was afterwards alleged to be invalid, amongst other reasons, because, when the petition for the sale was filed by *A*, he had not been appointed administrator, and the appraisers were selected by *A*, and the appraisement made before his appointment.

Held, That, under sections 27 and 28, (R. S. 1843, p. 455,) the sale so made was valid.—*Rice et al. v. Cleghorn et al.*, 80

4. BONDS OF EXECUTORS AND ADMINISTRATORS.—The bond given by an administrator, upon his appointment, (under section 19, 2 G. & H. p. 489,) is designed alone to secure the faithful administration of the personal property of his intestate, and the proceeds of the sale of such real estate as shall be sold in pursuance of the terms of a will, and such bond can cover only breaches of that trust.—*Worgang's Adm'r v. Clipp et al.*, 119

5. BOND ON SALE OF REAL ESTATE BY SAME.—But if, in the course of the settlement of an estate, it becomes necessary to sell other real estate, and an additional bond is then given, (under section 82, 2 G. & H. p. 510,) the latter bond is designed only to secure the faithful discharge of the new duties thus imposed upon him, and the bond so given can only cover the neglect of duty in the administration of the proceeds of such real estate. *Ibid.*

6. WILL.—On *January* 23, 1860, *A* sold to *B* a tract of land for 800 dollars, of which 200 dollars were paid at the date of sale, and the balance was agreed to be paid in annual installments of 100 dollars each, and was to be secured by notes, and a mortgage on the land.

A executed a deed to *B* for the land, and delivered it to a third person, as an escrow, to be given to *B* on his execution and delivery of the notes and mortgage. On *May* 29, 1860, *A* died, and by his will, executed the day before his death, he devised to his wife, *C*, and to his daughter, *D*, a certain town lot, being all the real estate he then owned, except such interest as he then had in the land sold as aforesaid. He also devised to his wife, *C*, the proceeds of all debts due him, after the payment of his debts, and to *E* and *F* all other lands which he then owned. On *January* 8, 1861, administration, with the will annexed, was granted to *G*, on the estate of *A*, and the notes and mortgage aforesaid were then executed and delivered by *B* to such administrator. *E* and *F* claim the notes under the will.

Held, That *E* and *F* take nothing under the provisions of the will, because, by the sale of said land as aforesaid, the estate of the vendor therein was converted into a money fund, which went to the personal representative, and the residue, after the payment of debts, would belong to *C*, the widow, under the will.—*Cooper et al. v. Cooper et al.*, 124

7. EXECUTORS AND ADMINISTRATORS—WIDOW.—*A* executed a mortgage on his land to *B*, in which his wife joined, to secure the payment of a debt. *A* died since the taking effect of the code of 1852, his wife him surviving, and said debt remaining unpaid. *C* became administrator of his estate, and there came into his hands, as such, assets sufficient to pay the expenses of administration, the expenses of the intestate's last illness, and funeral expenses, and said mortgage debt. But he failed to pay the mortgage debt, and suffered the mortgage to be foreclosed, and the property to be sold to pay said debt, and applied said assets to the payment of other debts not liens on the real estate.

Held, 1. That it was the duty of the administrator to pay said mortgage debt out of said assets, and that his neglect to do so constituted a breach of his official bond.—*The State ex rel. Lockhart v. Mason*, 172

8. *Held*, 2. That the widow of *A* had a right to have said assets applied in payment of said debt before the payment of general debts, and was damaged by the failure of the administrator to so apply it, and, for such damage, she had a right of action against him and his sureties on his official bond. *Ibid.*

9. *Held*, 3. That, so far as a widow takes by descent from her husband, under the provisions of chapter 46, 1 G. & H. 291, she takes also as his heir, and, therefore, she may, under sec. 162, 2 G. & H. 529, maintain an action against an executor or administrator on his bond. *Ibid.*

10. EXECUTORS AND ADMINISTRATORS.—An executor can not lawfully appropriate the assets of the estate of his testator to the payment

of his individual debts, and his individual creditor who so receives them, with notice of their character, and of the relations of the debtor to the estate, may be required to pay them to the estate.—*Austin v. Willson's Executor*, 252

11. ADMINISTRATOR *de son tort*.—A person sued as an administrator *de son tort*, to recover the value of assets of the estate, which he had converted to his own use, or disposed of, is entitled to be allowed, in reduction of damages, the amount of such assets applied by him to the proper uses of the estate, in the payment of debts, or otherwise.—*Reagan v. Long's Adm'r*, 264
12. SAME—PRACTICE.—In such an action, the defendant, under the general denial of the complaint, may give evidence generally tending to disprove the plaintiff's right to recover, or to damages. *Ibid*.

EXPRESS COMPANIES.

1. EXPRESS COMPANY, LIABILITY OF.—If an express company receives for collection, for a compensation, a bill of exchange drawn in one State and payable in another, and delivers the same to a notary for demand and protest on the day before such demand and protest should be made, and such notary makes demand and protest one day before the maturity of the bill, whereby the drawer and indorsers are discharged, the acceptor being insolvent, the express company will be liable to the holder for the amount of the bill and interest.—*American Express Co. v. Haire*, 4

FALLS PILOTS.

1. FALLS PILOTS—STATUTES CONSTRUED.—The law of *Indiana*, "regulating the licensing of pilots at the Falls of the *Ohio*," &c., is valid, at least so far as commercial intercourse may be carried on between the parts of said State named in said act, by citizens of said State. 1 G. & H. 473.—*Barnaby v. The State*, 450

FEEES OF COUNTY.

1. TREASURER'S FEES—STATUTES CONSTRUED.—The treasurer of a county is entitled to five per cent. as commissions, only on the amount he may collect on the delinquent list, to be furnished him by the auditor, after his *March* settlement with the auditor, and before he receives the duplicate for the next year.—*The Board of Commissioners of Grant Co. v. Miles*, 438
2. SAME.—For the amount of taxes collected on his duplicate, as well delinquent as current, after he receives said duplicate, and before he makes his *March* settlement, his compensation is regulated by the act of *June 4, 1861*. Acts Spec. Sess. 1861, p. 41. *Ibid*.

FORECLOSURE.

See MORTGAGE, 3, 6. MISTAKES, 1. PLEADING, 29.

1. MORTGAGE—FORECLOSURE.—Where suit is instituted against the heirs and administrator of a deceased mortgagor to foreclose a mortgage, no judgment can be rendered against such administrator for the balance of the debt not satisfied by the sale of the mortgaged premises.—*Newkirk v. Burson*, 129
2. PARTIES—FORECLOSURE.—The mortgagor is not a necessary party in an action to foreclose a mortgage, where he had sold the equity of redemption before the commencement of the foreclosure suit.—*Stevens v. Campbell*, 471
3. SAME.—But, if the mortgagee desired to recover a personal judgment against the mortgagor for any deficiency after the sale of the mortgaged property, then he would be a necessary party. *Ibid.*

FORMER RECOVERY.

1. FORMER RECOVERY.—If the testimony offered in the second suit is sufficient to authorize a recovery, but could not have authorized a recovery in a former suit, the failure of the plaintiffs in the former is no bar to his recovery in the second suit, although it is for the same cause of action for which he attempted to recover in the former suit. If the former suit, upon the trial of it, had a wider range than the pleadings in it indicated, such fact might, under appropriate issues, be shown by parol proof.—*The Indianapolis and Cincinnati R. R. Co. v. Clark*, 150
2. PRACTICE—FORMER RECOVERY.—A judgment for costs on sustaining a demurrer to a complaint, where the plaintiff declines to amend, and his action is therefore dismissed, can not be pleaded as a former recovery in bar of a subsequent action for the same cause, unless the record affirmatively show that the merits were decided upon the demurrer.—*Estep v. Larsh*, 190
3. PRACTICE—FORMER RECOVERY.—In an action to foreclose a mortgage, where the defendant, who is a non-resident of the State, appears and pleads in bar a former decree in foreclosure of the same mortgage, if it be shown by evidence that he had no notice, actual or constructive, of the pendency of the suit in which that decree was rendered, or if it appears affirmatively, or by reasonable inference, from the record of the proceedings in which that decree was rendered, that he had no such notice, then such decree will be a nullity, and will constitute no bar to the second suit.—*Woodhull v. Freeman*, 229
4. FORMER RECOVERY.—Where the same question is at issue between the parties in two successive actions, the judgment rendered for the

defendant in the first is an absolute bar to a recovery by the plaintiff in the second; but otherwise, where the questions at issue are essentially or materially different in the different actions, or under different pleadings in the same action.—*Bougher v. Scobey*, 365

5. SAME.—When a material question, involved in a subsequent suit, has been, under proper issues, determined in a prior action between the same parties, and such determination does not appear by the record of the judgment it may be shown by extrinsic proof. *Ibid.*

FRAUD, &c.

See SALES.

1. FRAUDULENT REPRESENTATIONS.—As to what misrepresentations in the sale of property will be deemed fraudulent, see the opinion at length.—*Estep v. Larsh*, 190
2. CONTRACT—FRAUD.—Executed contracts, made to hinder, delay, and defraud creditors, although void as to creditors, are binding upon the parties themselves; but executory contracts, made for the same purpose are void, both as to creditors and between the parties, and will not be enforced.—*Welby v. Armstrong*, 489

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—BOND.—The additional bond given by a guardian, in an application to sell the real estate of his ward, under § 18, 2 G. & H. 571, is not discharged by the fact that, on reporting the sale of the real estate, he produced the proceeds of the sale in Court and then withdrew them by order of the Court.—*The State ex rel., &c. v. Steele*, 207
2. SAME.—Such a bond is not merely subsidiary to the original bond given by the guardian, but is an independent undertaking, and can only be discharged by the actual payment of the moneys arising from the sale of the real estate, according to law, to the ward, or other person entitled to receive the same, and suit may be instituted upon such bond whenever it is broken, without first resorting to the original bond. *Ibid.*
3. SAME.—The guardian, and not the judge or clerk of the Court, is the proper custodian of the moneys arising from the sale of the ward's real estate. *Ibid.*
4. The cases of *Salzer v. The State*, 5 Ind. 202, and *Salzers v. Ross*, 15 *id.* 130, are distinguished from the present. *Ibid.*
5. GUARDIAN—COMMITTEE.—A general guardian of an insane person, under our statutes, is substantially the committee of such person, and is the proper party to appear for her without any special order of the Court.—*Symmes v. Major*, 443

HABEAS CORPUS.

1. HABEAS CORPUS, SUSPENSION OF WRIT OF.—Neither the President, nor the Congress, of the *United States*, can suspend the issue of the writ of *habeas corpus* by a State Court.—*Griffin v. Wilcox*, 370

HIGHWAYS.

See CRIMINAL LAW AND PRACTICE, 24.

HUSBAND AND WIFE.

See MARRIED WOMEN.

1. HUSBAND AND WIFE—ADMISSIONS.—In any action by an administrator, on a note payable to his intestate, who, at its date, was a married woman, if failure of consideration, or other defence, is pleaded by the makers, the admissions of the payee of the note, whilst living, if they tended directly to benefit or injure herself, and only collaterally effected her husband, would be competent evidence for the defendants.—*Bevins v. Cline's Adm'r*, 37
2. STATUTES CONSTRUED—EVIDENCE.—In section 3, of the act of 1861, (2 G. & H. p. 168,) the term, "confidential communications," seems to be limited to matters confided to attorneys, physicians and clergymen, and does not include communications between husband and wife, and the right to waive objections to their disclosure, therefore, does not apply to the latter. *Ibid.*
3. HUSBAND AND WIFE—MARRIED WOMEN.—A relinquishment of her contingent interest in her husband's real estate, by the wife, her husband being alive, is a valuable and sufficient consideration for a conveyance by her husband, or procured by him, to her, of property which may be considered but a fair equivalent for such interest; and such conveyance will be deemed valid or invalid as it may be shown to be fair or fraudulent, and the comparative value of the respective estates may be taken into consideration.—*Hollowell v. Simonson*, 398
4. WITNESS—HUSBAND AND WIFE.—Where the husband and wife are both parties to an action, but the subject matter in controversy is claimed by the wife, and, under the issues in the cause, the husband discloses no such interest as would render him a competent witness in his own behalf, his testimony ought not to be admitted. *Ibid.*
5. HUSBAND AND WIFE—MARRIED WOMEN.—In 1843, *A* contracted with *B*, the wife of *C*, and *D*, the daughter of *C*, for the sale to them of certain land, for 1,000 dollars, one-half whereof was paid at the date of contract, and a title bond executed by *A* for the conveyance of the land to *D*, and *B* and *D* executed their promissory

note to *A*, at twelve months, for the other half of the purchase money, which was paid at maturity, and then said bond was canceled, and, under another arrangement, *A* conveyed said land to *E*, a son-in-law of *B* and *C*. The first payment on the land was made in part by the transfer of a note to *A*, which *B* held in her own right, *C* having nothing to do with the transfer, and all of the residue of the purchase money was paid by *B*, with her own money, received from the estate of her grandfather. Said money was received by her after her marriage with *C*, but never came into his possession, and was never claimed by him by virtue of his marital rights, or otherwise. Said money did not come to her with any limitation to her separate use. *B* and *C* and their family together occupied and used said land. Action to subject said land to payment of *C*'s debts.

Held, that the money with which said land was purchased never became the property of *C*, the husband, and that the land therefore could not be subjected to the payment of *C*'s debts.—*Standeford v. Devo*, 404

6. *Held*, also, that, prior to the laws of this State enlarging the rights of married women, the personal property of the wife, which came to her after the marriage, did not become the property of the husband, *ipso facto*, but only when it had been actually reduced to possession by him, by such acts as evinced an intention to divest his wife's right or title, and make it absolutely his own. *Ibid*.

7. HUSBAND AND WIFE—TORTS OF WIFE.—The husband is liable for the torts and frauds of his wife, committed during coverture. If committed in his company, or by his order, he is alone liable. If not, they are jointly liable, and the wife must be joined in the suit with the husband.—*Ball v. Bennett*, 427

8. SAME—EVIDENCE.—If husband and wife are jointly prosecuted in a civil action for the tort of the wife, in the alleged burning by her of a mill, it is competent for the plaintiff to prove that, within a short period before, and just preceding the burning, the wife was heard to threaten that, "she would burn it; that she would put a torch to it; that it should not stand much longer; that the old rattle trap should be burned up," &c. *Ibid*.

9. WITNESS—HUSBAND AND WIFE.—As to the admissibility of the testimony of the husband in a case in which he and his wife are both parties, and she claims an interest in the subject matter in controversy, under a given state of the pleadings and evidence, the reader is referred to the latter part of the opinion.—*Meni v. Rathbone*, 454

IMPEACHMENT.

1. IMPEACHMENT OF WITNESS.—Evidence designed to impeach the general character of a witness should relate to the time when he

testified, and his character at the place where he then resided, and amongst those who knew it there.—*The City of Aurora v. Cobb*, 492

INFANCY.

1. In an action for seduction, in which it is alleged that the seduction was accomplished under a promise of marriage, an answer by the defendant that, at the time of the commission of the act, &c., he was an infant, under the age of twenty-one years, &c., constitutes no bar to the action, and is demurrable.—*Lee v. Hefley*, 98

INSTRUCTIONS BY COURT.

1. INSTRUCTIONS TO JURY.—In an action for seduction, where both the daughter and her alleged seducer testify and directly contradict each other, and there is testimony tending to sustain the daughter, it is error, as tending to mislead the jury, for the Court to instruct the latter, that "as to the main fact of sexual intercourse, the daughter affirms it and the defendant denies it, and if the two seem equally to claim your credence, you can not, in such case, find for the plaintiff, because, as to that fact, which is radical in the case, there is no preponderance for the plaintiff."—*Pruitt v. Cox*, 15
2. PRACTICE—INSTRUCTIONS TO JURY.—It is error for the Court to charge the jury verbally, when requested by either party to reduce its instruction to writing.—*The Toledo and Wabash Railway Co. v. Daniels*, 256
3. INSTRUCTIONS TO JURY—CONTRACT.—Action by *A* against the estate of *B*, her father, on a note for 1,000 dollars, given by him in his lifetime, payable to her at his death. Answer, first, want of consideration, and second, that the note was given in consideration of *A*'s agreement to live with and keep house for her father, during his life, which she failed to do. Issues. Trial by jury. It appeared that she resided with, and kept house for, her father, six or seven years after her majority, and, when the note was given, in 1860, she agreed not to marry, but to take care of him during his life. She did not marry. The evidence was conflicting as to the amount and kind of services rendered by her for him, and as to the precise terms of their contract.
Held, 1. That, under the circumstances, the following instruction was proper: "If the note was executed in consideration that *A* should live with and keep house for her father during his life, and she, without sufficient cause given by him, or without his consent, left his service before his death, she would be entitled to recover the reasonable value of her service while she lived with him. But, if she left his service, with his consent, not obtained through her own misconduct, some time after the execution of the note, and no effort was made by him to recover possession of the note, or correct it,

the jury will be authorised, in the absence of any evidence tending to show an abandonment of the contract, to find that it still existed, and that he waived the further performance of it on her part, and she will be entitled to recover the whole amount."—*Pitts' Adm'r v. Pitts*, 309

4. *Held*, 2. That the following also is correct: "If *A*, after her majority, continued to live with her father, as she had done previously, with no new duties or responsibilities, and was provided with necessaries, &c., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between them, before these services were rendered, that she should receive such compensation, and, if the note was given for such past services, and there was no such understanding between them, she can not recover. But, if the note was given for such past services, the fact that it was given, will raise a presumption that there had been a previous understanding between them, that such compensation should be made, and, unless such presumption is overcome by evidence, that no such understanding existed, she will be entitled to recover." *Ibid*.

JUDGMENT.

See DIVORCE, 1, 2.

1. JUDGMENT—ACTION.—A judgment is a debt of record, and an action will lie to recover it, whether the judgment is foreign or domestic, and notwithstanding the plaintiff may have a remedy on the judgment, in the Court where it was rendered, by execution or otherwise.—*Davidson v. Nebaker*, 334

JURISDICTION.

1. JURISDICTION—DECEDENT'S ESTATES.—In an application by an administrator for an order to sell real estate, if the record show that the heirs were not otherwise notified of the pendency of the proceedings than by the appointment of a guardian *ad litem* for them, and citing him to appear and show cause why the property should not be sold, the Court would have no jurisdiction over them, and the proceedings as to them would be a nullity.—*Guy v. Pierson*, 19
2. SAME—PRACTICE.—In such a proceeding, if the record fail to name the heirs otherwise than by the general designation, "heirs," the proceeding will also be void as to them, and there could arise no presumption that the Court had acquired jurisdiction over any other persons than those named, and, in such case, the heirs could not prosecute an action for review of the proceeding, because they were not parties to it; but it would be otherwise if the proceedings had been against them as *unknown* heirs. *Ibid*.

3. JURISDICTION—REPLEVIN.—Actions of replevin may be instituted before any justice of the peace in the county, without reference to the fact that the defendant may reside in a different township from that in which the justice resides.—*Test et al. v. Small*, 127
4. RAILROADS—DAMAGES.—The Circuit Court and Courts of Common Pleas have concurrent jurisdiction in actions for the assessment of damages for lands taken by railroad companies, and where proceedings for such purpose have been commenced in one of said Courts, and appraisers appointed thereby, and an award made and returned by them, the other Court can not then deprive it of jurisdiction.—*Hughes v. The Lake Erie and Pacific R. R. Co.*, 175
5. JURISDICTION—JUSTICE OF THE PEACE.—In suits commenced by *capias ad respondendum*, the jurisdiction of a justice of the peace extends throughout his county, and over all persons found therein, whether they reside therein or in other counties.—*Harris v. Knapp*, 198
6. TRESPASS—JURISDICTION.—The wrongful taking or detention of personal property is a trespass, in the general sense of the word, and, under § 15 of the justice's act, an action for such trespass, in the form of an action of replevin, may be brought, either in the township where the defendant resides, or where the trespass was committed, and process served throughout the county.—*Cook's Adm'r v. Gibson*, 303
7. JURISDICTION—RECOGNIZANCE.—A person, who has been indicted for felony and arrested in one county, but, by reason of the insufficiency of the jail thereof, is confined in the jail of an adjoining county, may apply, by petition for writ of *habeas corpus*, to the judge of the Court of Common Pleas of the latter county, to be there admitted to bail, and such judge may legally grant such writ, and direct the prisoner to be admitted to bail, in the penalty prescribed by the Court of the county where the indictment was found, and, if the prisoner execute such recognizance with surety, conditioned for his appearance at the next term of the proper Court, and the same be approved by the sheriff of the county in which he is so confined, such recognizance will be valid, although the day of the month on which said Court will meet may be incorrectly recited in such recognizance.—*Hunter v. The State*, 351

LIMITATIONS.

See PLEADING, 13.

1. LIMITATIONS.—Where infant wards, soon after the appointment of their guardians, remove from this State, and continue to reside abroad, the statute of limitations does not run against them until they return. 2 G. & H. 161, § 216.—*Smith v. Wiley*, 224

JUSTICE OF THE PEACE.

1. **JURISDICTION.**—In suits commenced by *capias ad respondendum*, the jurisdiction of a justice of the peace extends throughout his county, and over all persons found therein, whether they reside therein or in other counties.—*Harris v. Knapp*, 198
2. **PRACTICE—PLEADING.**—As to what is a sufficient complaint to entitle a party to a writ of *capias ad respondendum* from a justice's Court, see the opinion at length.—*Paul v. Ward*, 211
3. **SAME.**—In actions commenced by *capias ad respondendum*, if the affidavit is, on its face, sufficient to entitle the plaintiff to the writ, he is entitled to have a trial of the cause upon its merits. *Ibid.*
4. **TRESPASS—JURISDICTION.**—The wrongful taking or detention of personal property is a trespass, in the general sense of the word, and, under § 15 of the justice's act, an action for such trespass, in the form of an action of replevin, may be brought, either in the township where the defendant resides, or where the trespass was committed, and process served throughout the county.—*Cook's Adm'r v. Gibson*, 303

LANDLORD AND TENANT.

1. **LANDLORD AND TENANT—LEASE.**—The right of a landlord to re-enter, for breach of a condition subsequent, is not viewed with favor in the law, and, where he claims a forfeiture, he must show that he has done everything required on his part to perfect such right of re-entry.—*Meni v. Rathbone*, ✓ 454
2. **SAME—LEASE—CONDITION.**—Where a lease is conditioned, that, "if default shall be made in any of the covenants therein contained on the part of the lessee, then such lease shall be deemed forfeited, and it shall be lawful for the lessor to re-enter said premises and remove all persons therefrom," and one of the covenants on the part of the lessee requires him to pay all taxes assessed against the premises, and he fails to pay the same, the lessor can not take advantage of the breach of such covenant to forfeit the lease without first demanding or requesting the lessee to pay such taxes. *Ibid.*

LEASE.

See **LANDLORD AND TENANT**, 1, 2.

LIEN.

See **MECHANIC'S LIEN**, 1.

1. **LIEN OF JUDGMENT—SHERIFF'S SALES.**—A judgment is no lien on land, which the debtor holds by a bond, or school land certificate issued by a county auditor under the school law, conditioned

for the execution of a title on payment of the purchase-money, though he had taken possession and paid the money before the rendition of the judgment; and a sheriff's sale, on execution against the obligee of land so held, conveys no estate to the purchaser.—*Jeffries v. Sherburne*, 112

MARRIED WOMEN.

See STATUTES CONSTRUED, 12. WIDOW, 1, 2, 3.

1. MARRIED WOMEN, PROPERTY OF.—Section 5 (1 G. & H. p. 374,) includes lands which the wife may acquire by purchase, as well as in other modes.—*Johnson v. Runyon et al.*, 115
2. SAME.—Personal property acquired by a married woman, with the profits of her real estate, does not become the property of her husband by being left in his possession and use, and a sale of it on execution, for the payment of his debts, would not divest her title, or convey any title to the purchaser. *Ibid.*
3. APPAREL—CRIMINAL LAW AND PRACTICE.—The wearing apparel of a married woman, furnished by her husband as a marital duty, remains his personal property during his life, and he can sell it or give it away during that period, but she may retain such as she may have at his death as her paraphernalia; and an indictment, for the stealing of such apparel, during the husband's life, charging it to be the property of the wife, can not be sustained.—*The State v. Hays*, 288
4. SEPARATE PROPERTY—DEBTS.—The income or proceeds arising from the separate real estate of a married woman can only be subjected to the payment of her debts, contracted during coverture, by a proceeding in equity for that particular purpose, and not by any ordinary common law action and judgment against her.—*Cummins v. Sharpe*, 331
5. HUSBAND AND WIFE—MARRIED WOMEN.—A relinquishment of her contingent interest in her husband's real estate, by the wife, her husband being alive, is a valuable and sufficient consideration for a conveyance by her husband, or procured by him, to her, of property which may be considered but a fair equivalent for such interest; and such conveyance will be deemed valid or invalid as it may be shown to be fair or fraudulent, and the comparative value of the respective estates may be taken into consideration.—*Hollowell v. Simonson*, 398
6. HUSBAND AND WIFE—MARRIED WOMEN.—In 1843, A contracted with B, the wife of C, and D, the daughter of C, for the sale to them of certain land, for 1,000 dollars, one-half whereof was paid at the date of contract, and a title bond executed by A for the conveyance of the land to D, and B and D executed their promissory

note to *A*, at twelve months, for the other half of the purchase-money, which was paid at maturity, and then said bond was canceled, and, under another arrangement, *A* conveyed said land to *E*, a son-in-law of *B* and *C*. The first payment on the land was made in part by the transfer of a note to *A*, which *B* held in her own right, *C* having nothing to do with the transfer, and all of the residue of the purchase-money was paid by *B*, with her own money, received from the estate of her grandfather. Said money was received by her after her marriage with *C*, but never came into his possession, and was never claimed by him by virtue of his marital rights, or otherwise. Said money did not come to her with any limitation to her separate use. *B* and *C*, and their family together, occupied and used said land. Action to subject said land to payment of *C*'s debts.

Held, That the money with which said land was purchased never became the property of *C*, the husband, and that the land, therefore, could not be subjected to the payment of *C*'s debts.—*Standeford v. Devol*, 404

7. *Held*, also, that, prior to the laws of this State enlarging the rights of married women, the personal property of the wife, which came to her after the marriage, did not become the property of the husband, *ipso facto*, but only when it had been actually reduced to possession by him, by such acts as evinced an intention to divest his wife's right or title, and, make it absolutely his own. *Ibid.*

MECHANIC'S LIEN.

1. STATUTES CONSTRUED—MECHANIC'S LIEN.—Under sections 647 and 648 of the code, on the subject of mechanic's liens, no lien can be acquired upon specific articles furnished for a building, as distinct from the building, but only upon the building in which they are placed, or on the land whereon they are placed, or both.—*Bayliss v. Sinex*, 45
2. MECHANIC'S LIEN—PLEADING.—In an action to enforce a mechanic's lien, a complaint against husband and wife, which sets out a note given by the former, and a sufficient notice of intention to hold a lien upon the house and lots as his property, and avers that he holds the property by an unrecorded title bond, fraudulently taken in the name of his wife, but paid for by him, and occupied by both, that she stood by and encouraged the building of the house, &c., is not bad on demurrer.—*Peck and Wife v. Hensley*, 344
3. NOTICE OF LIEN.—As to the requisites of the notice of lien generally, and especially where the title to the property is held by a married woman, by an unrecorded conveyance, the reader is referred to the opinion at length. *Ibid.*

MERGER.

See PRACTICE, 9, 10. SHERIFF, 2, 3, 4, 5, 6, 7.

1. PROMISSORY NOTES—MERGER.—A suit and judgment upon a joint note against one promissor constitute a bar to any other suit against any other promissor, because the note is thereby merged in the judgment.—*Archer v. Heiman*, 29

MILITARY LAW.

See PROVOST MARSHAL, 1. 2. See HABEAS CORPUS, 1.

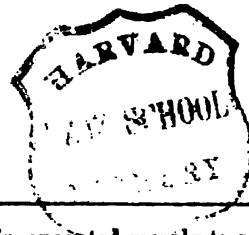
1. PRESIDENT OF UNITED STATES—HIS POWERS IN WAR.—The President of the *United States* has a right to govern, through his military officers, by martial law, when and where the civil power is suspended by force; in all other times and places the civil excludes martial law—excludes government by the war power.—*Griffin v. Wilcox*, 370

MISTAKES.

1. CORRECTION OF CONTRACT—PRACTICE.—Under the provisions of § 71, 2 G. & H. 98, a mistake in a promissory note, in the amount for which the same is given, may be reformed, and judgment rendered for the amount due upon the note as reformed, in one and the same action.—*Rigsbee v. Trees*, 227

MORTGAGE.

1. EXECUTION — CHATTEL MORTGAGE.—Where personal property (mortgaged) continues in the possession of the mortgagor, and is taken in execution to pay his debt, it is incumbent on the mortgagee, in an action to recover the same, to show that the mortgage had been recorded within ten days after the execution thereof.—*Matlock's Adm'r v. Straughn*, 128
2. MORTGAGE—FORECLOSURE.—Where suit is instituted against the heirs and administrator of a deceased mortgagor to foreclose a mortgage, no judgment can be rendered against such administrator for the balance of the debt not satisfied by the sale of the mortgaged premises.—*Newkirk v. Burson*, 129
3. ESTATE MORTGAGED SOLD IN PARTS AT DIFFERENT TIMES.—Where the mortgagor sells portions of the land at different times, the several parcels will be liable under the mortgage in the inverse order of such sales.—*Aiken et al. v. Bruen et al.*, 138
4. MORTGAGED CHATTELS, SALE OF.—The equity of redemption of mortgaged chattels may be sold on execution, and the sheriff is entitled, for that purpose, to levy upon and take possession of the same.—*Schrader v. Wolfen*, 238



5. **MORTGAGE—FRAUD.**—If a mortgage is executed merely to protect property in the hands of the mortgagor from his creditors, other than the mortgagee, the mortgagor retaining possession, and the right of disposition, and these facts appear upon the face of the mortgage, it would be fraudulent and void, as against other creditors, and should be so declared by the Court; and the same result would follow, if the same intention and facts were established by parol evidence or otherwise.—*The New Albany Ins. Co. v. Wilcoxson et al.*, 355
6. **MORTGAGE SALE BY STATE—CONTRACT.**—Where the Auditor and Treasurer of State, on a Saline Fund mortgage, on which the mortgagor, and the persons holding under him, have failed to pay the interest, offer the mortgaged property for sale, for the collection of a larger sum than the amount actually due upon the mortgage debt, at the date of the sale, and no person offers to purchase the property at the excessive price demanded, and the same is therefore purchased by the State, at such excessive price, the sale so made to the State will be void, by reason of such excess, and a subsequent sale thereof, by the State to another person will also be void, because the State, by her purchase, having acquired no title, can transmit none.—*Vail v. McKernan*, 421
7. **TRUST MORTGAGE—CONSTRUCTION OF CONTRACT.**—The decision herein relates entirely to the construction of a contract, relating to real estate, and can not be briefly stated. See the opinion at length.—*Thompson v. Hollingsworth*, 475
8. **MORTGAGE—BOND—AGREEMENT.**—Several interesting questions of construction are settled in *The City of Aurora v. Cobb*, 492

NEW TRIAL.

1. **NEW TRIAL—PRACTICE.**—Under the code, a new trial after the term can only be granted for a cause for which a new trial might have been granted during the term, had the cause then been known, and the same facts must be made to appear before the Court, to determine the exercise of its discretion in the one case as in the other.—*Glidewell v. Daggy*, 95
2. **SAME.**—Where an application for a new trial is made after the term, based upon newly discovered evidence, there must be brought to the knowledge of the Court, by affidavits or otherwise, the issues in the cause, the evidence adduced upon a former trial, and the newly discovered evidence, in order that the Court may correctly determine its duty in the premises. *Ibid.*
3. **SAME.**—The application for a new trial must be made by a complaint, which should show, on its face, a cause for a new trial, to the end that, if it should be demurred to, and thereby admitted, the Court could finally act upon it. *Ibid.*

4. PRACTICE—NEW TRIALS.—A Court is not bound to grant a new trial, although both parties desire it.—*Aiken v. Bruen*, 137
5. PRACTICE—NEW TRIAL.—Where a party asks for a new trial on the ground of newly discovered evidence, he must set forth in his bill of exceptions the testimony which was submitted below, so as to enable the Court to determine whether the result would be changed by the new testimony, or whether the testimony would be merely cumulative.—*Ruddick's Adm'r v. Ruddick's Adm'r*, 163
6. NEW TRIAL UNDER ART. XXIX.—Where *A* made a mortgage to secure a loan of money from the Trust Funds, and, after several transfers of the mortgaged property, the auditor, to collect the mortgage debt, advertised and sold the property in the name of the mortgagor, and *B* became the purchaser on a credit of a few days, and before the purchase money was paid, the owner of the fee at the time of the sale offered to pay the debt and interest, which was refused by the auditor, and the owner then sued to enjoin the execution of a deed to *B* and to set aside the sale, and had judgment upon the trial, and *B* then demanded a new trial as of right, under article XXIX of the Code, (2 G. & H. 281,) which was refused by the Court.
Held, that the new trial should have been granted.—*Bender v. Sherwood*, 168
7. PRACTICE.—An application for a new trial on the ground of the misconduct of the jury, must be sustained by an affidavit showing its truth.—*Urban v. Kraigg*, 174
8. NEW TRIAL—SURPRISE.—Under the law allowing parties to testify, where the plaintiff simply swears to the truth of his complaint, it is doubtful whether the defendant can in any case have a new trial on the ground alone that he was surprised by such testimony of the plaintiff.—*Cox v. Hutchings*, 219
9. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative, or where it might not change the result on another trial. *Ibid.*
10. PRACTICE.—An application for a new trial shall be verified. *Ibid.*
11. NEW TRIAL—SURPRISE.—When the plaintiff, in an action, testifying in his own behalf, sustains the averment in his own complaint, where he had full knowledge of the fact, the defendant can not obtain a new trial on the ground that he was surprised by such testimony.—*Peck v. Hensley*, 344

NOTARY PUBLIC.

1. NOTARY, NOTICE BY.—A notary, in giving notice of protest, does not act officially, but as the agent of the holder of the bill, and,

therefore, his signature to the notice, without attestation by his seal of office, is sufficient.—*Palmer et al. v. Whitney, &c.*, 58

NOTICE.

See PRINCIPAL AND SURETY, 1, 2.

1. NOTICE OF LIEN.—As to the requisites of the notice of lien generally, and especially where the title to the property is held by a married woman, by an unrecorded conveyance, the reader is referred to the opinion at length.—*Peck v. Hensley*, 344
2. NOTICE—ADVERSE POSSESSION.—Where, at the time an interest is acquired in real estate by one person, it is in the actual possession and use of another, under a claim of title, the person acquiring such interest should take notice thereof and make inquiry.—*Mew v. Rathbone*, 454
3. NOTICE—REGISTRY.—The record of a conveyance, which was not recorded within the period prescribed by law, but was recorded thereafter, would constitute notice to all purchasers after the conveyance was so placed upon the record. ✓ *Ibid.*

OFFICE—OFFICER.

See AUDITOR OF COUNTY, 1, 2. VACATION OF OFFICE, 1, 2.

1. SAME—"EXTRA SERVICES."—Under section 1 of the act of March 11, 1861, 2 G. & H. p. 652, *extra services* should be construed to embrace all services rendered by the officers therein named, for which no compensation is given by law, and one hundred dollars is the largest amount which the county can legally allow for such extra services.—*The Board, &c., of Miami Co. v. Blake*, 32
2. SERVICES—CONSTITUTIONAL LAW.—Officers take their offices *cum onere*, and services required of them by law, for which they are not specifically paid, must be considered compensated by the fees allowed for other services, and this construction involves no violation of sec. 21, article 1, Constitution of *Indiana*. *Ibid.*
3. TITLE TO OFFICE—APPOINTMENT.—Where the title to an office is derived solely from Executive appointment, the commission of the Executive is the only legal evidence of such title.—*The State, &c. v. Allen*, 516
4. SAME—ELECTION.—But, where the title to an office is derived from popular election, the commission of the Executive is not absolutely necessary to establish the right to exercise the duties of such office. *Ibid.*

ONUS PROBANDI.

1. ONUS PROBANDI.—A person who seeks the interposition of the Courts to avoid a sale of lands, except, perhaps, in the case of tax sales, assumes the *onus* of showing that he is entitled to the relief asked.—*Vail v. McKernan*, 421

OVERRULED CASES.

See CASES OVERRULED.

PARTIES.

See PLEADING, 22, 23, 24.

1. PARTIES—FORECLOSURE.—The mortgagor is not a necessary party in an action to foreclose a mortgage, where he had sold the equity of redemption before the commencement of the foreclosure suit.—*Stevens v. Campbell*, 471
2. SAME.—But, if the mortgagee desired to recover a personal judgment against the mortgagor for any deficiency after the sale of the mortgaged property, then he would be a necessary party. *Ibid.*

PARTNERS—PARTNERSHIP.

See PLEADING, 22, 23, 24.

PAYMENT.

See CONTRACTS, 1.

1. PAYMENT OF TAXES.—The payment of taxes in an illegal and void currency, is a nullity, and the tax collector might, notwithstanding such payment, proceed to collect them as in other cases.—*Richards, &c. v. Stogsdell et al.*, 74

PLEADING.

See PRACTICE, 18. ATTACHMENT, 1, 2, 3, 4. *See* MOORE v. ENNIS, 315.

1. PLEADING—RAILROADS.—In an action for forcibly entering upon land, and digging the soil, excavating pits, making embankments, &c., an answer that the defendants entered as the servants of a specified railroad company, which had legally appropriated the injured property as the line of her road, &c., would justify the entry and bar the suit—*Green v. Boody*, 10
2. CONTRACT—PAYMENT—PLEADING.—A recovered a judgment against a county, and, a few days thereafter, the county auditor issued county orders to pay the judgment, and delivered them to A, who received them in payment and satisfaction of the judgment. The judgment was afterwards reviewed and reversed, and a new trial or-

- dered. A then pleaded the facts as aforesaid, as equivalent to a voluntary payment and discharge of the judgment by the county, and as a bar to a re-trial.
- Held*, That the auditor had no power to contract that said orders should be received in payment and satisfaction of said judgment, and that their delivery, as aforesaid, did not amount to payment, and constituted no bar to the re-trial of the cause.—*Chapin v. The Board, &c., of Steuben Co.*, 12
3. SEDUCTION—PLEADING.—In an action by the father against the seducer of his daughter, to recover damages, the basis of his recovery must be the loss of her service, his injured feelings, &c., and, in such action, a former recovery by the daughter, in an action in her own name, against her seducer, can not be pleaded in mitigation.—*Pruitt v. Cox*, 15
4. PLEADING.—A pleading based upon the proceedings and judgment of a Court, will be demurrable, unless it be accompanied by a transcript of the record. *Ibid.*
5. PLEADING.—An answer setting up, in bar of a whole cause of action, a matter which constitutes a bar to only a part of it, is bad. For forms of answers, and replies in such case, see the opinion at length.—*McDougle et al. v. Gates et al.*, 65
6. PLEADING—PRACTICE.—The decision herein relates to the sufficiency of certain pleadings, and can not be briefly stated.—*Hornady v. Campbell*, 76
7. PLEADING—PENDENCY OF ANOTHER ACTION.—Under the third subsection of section 50 of the code, (2 G. & H. p. 79,) where the pendency of another action for the same cause, between the same parties, is pleaded in abatement, it is not necessary to recite the complaint in the former suit, or to aver that such action is still pending, because it is sufficient, to abate the second action, to show that the first action was pending at the time the second action was commenced.—*Lee v. Hesley*, 98
8. PLEADING—SEDUCTION.—In an action by the female seduced against her seducer, to recover damages, it may be shown that the seduction was accomplished under a promise of marriage, and the facts and circumstances generally, which constituted the means of its accomplishment, may be alleged and proved. *Ibid.*
9. SAME—INFANCY.—In such action, the answer by the defendant, that at the time of the commission of the act, &c., he was an infant, under the age of twenty-one years, &c., constitutes no bar to the action, and is demurrable. *Ibid.*
10. REPLEVIN—PLEADING.—It is not necessary that the answer of the defendant in replevin should claim a return of the property;

but if the case made by the evidence authorizes a return, it may be awarded by the Court after verdict.—*Matlock's Adm'r v. Straughn*, 128

11. FORMER RECOVERY.—If the testimony offered in the second suit is sufficient to authorize a recovery, but could not have authorized a recovery in a former suit, the failure of the plaintiffs in the former is no bar to their recovery in the second suit, although it is for the same cause of action for which they attempted to recover in the former suit. If the former suit, upon the trial of it, had a wider range than the pleadings in it indicated, such fact might, under appropriate issues, be shown by parol proof.—*The Indianapolis and Cincinnati R. R. Co. v. Clark*, 150

12. COMPLAINT.—When a pleading is founded on a written instrument, the original or a copy must be filed with it.—*Will v. Brooks*, 178

13. PLEADING—LIMITATION.—Suit to contest the validity of a will. The complaint avers, amongst other things, the following facts: The will was admitted to probate before the Clerk on August 30, 1854, and, on May 6, 1857, the present plaintiff, one of the heirs of the testator, sued in the *Shelby* Circuit Court to annul the will and the probate thereof, making the other heirs and devisees defendants, and alleging sufficient grounds to invalidate said will, and on a trial in said Court, the will was adjudged to be void, and the probate thereof was set aside. The defendants appealed to the Supreme Court, and said judgment was reversed by that Court, on November 19, 1860, on the ground that the *Shelby* Circuit Court had no jurisdiction to adjudge said will and probate invalid, and, on February 18, 1861, this action was commenced in the *Shelby* Common Pleas, for the same purpose, against the same defendants, and praying for the same relief, upon the same grounds, and alleging that the plaintiff was, at the death of the testator, and at all times since has been, and now is, a resident citizen of the State of *Ohio*, and at no time, since said death, has been a resident citizen of the State of *Indiana*.

Held, That the complaint was good on demurrer, and that, under § 47, 2 G. & H. 561, the plaintiff's right of action was not barred by the lapse of time.—*Cornell v. Goodrich*, 179

14. PLEADING—FORMER RECOVERY.—A judgment for costs on sustaining a demurrer to a complaint, where the plaintiff declines to amend, and his action is therefore dismissed, can not be pleaded as a former recovery in bar of a subsequent action for the same cause, unless the record affirmatively show that the merits were decided upon the demurrer.—*Estep v. Lark*, 190

15. RAILROADS—PLEADING.—A complaint against a railroad company for stock killed by the machinery of the company, will be bad,

- even after verdict, if it fail to aver negligence, or that the road was not fenced.—*The Indianapolis, &c., R. R. Co. v. Brucey*, 215
16. CORRECTION OF CONTRACT—PRACTICE.—Under the provisions of § 71, 2 G. & H. 98, a mistake in a promissory note, in the amount for which the same is given, may be reformed, and judgment rendered for the amount due upon the note as reformed, in one and the same action.—*Rigsbee v. Trees*, 227
17. PLEADING.—An answer which goes to a whole cause of action, but only recites facts which constitute a bar to a part thereof, is bad.—*Louis' Adm'r v. Arford*, 235
18. PLEADING.—In a complaint to recover the value of stock killed by a railroad company, in one count whereof the stock is described as common stock, and in another as stock of the full blood, such difference is sufficiently material to sustain and render proper separate counts.—*The Toledo and Wabash R. R. Co. v. Daniels*, 256
19. PLEADING—PRACTICE.—The statute which requires, that "when any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading," is imperative. 2 G. & H. 104, § 78. And, if a complaint is defective in this particular, it will be demurrable, and, if not demurred to, and a verdict is rendered thereon in favor of the plaintiff, yet judgment can not be rendered in his favor over a motion in arrest, and, if neither a demurrer, nor a motion in arrest is interposed, still the error will be available in this Court. 2 G. & H. 77, § 50; *id.* 81, § 54.—*Reveal v. Conner*, 289
20. MECHANIC'S LIEN—PLEADING.—In an action to enforce a mechanic's lien, a complaint against husband and wife, which sets out a note given by the former, and a sufficient notice of intention to hold a lien upon the house and lots as his property, and avers that he holds the property by an unrecorded title bond, fraudulently taken in the name of his wife, but paid for by him, and occupied by both, and that she stood by and encouraged the building of the house, &c., is not bad on demurrer.—*Peck and Wife v. Hensley*, 344
21. PLEADING.—Where a written instrument, which constitutes the cause of action, is filed with, and made a part of, the first paragraph of the complaint, and, in the second paragraph thereof, it is alleged to be filed with the latter, and is referred to as already on file with the former, the latter will be sufficient. *Ibid.*
22. PLEADING—PARTIES—EVIDENCE.—A and B had been partners in business. Afterwards, A, B and C became partners in the same business. Still later, A retired from the firm, and B and C continued in partnership for some time, when they dissolved. Afterwards, B sued C for profits, received and not accounted for by him. C answered: 1. By denial. 2. Payment. 3. Claim for personal

- services. 4. That he had paid out all the profits made by *B* and *C* upon old debts of the firm of *A*, *B* and *C*. Demurrer to the 3d sustained. To the 4th, the Court held *A* a necessary party, and ordered that he be made a party, and continued the cause for that purpose. No steps were taken by *C* to make him a party before the next term. The cause was again continued for the same purpose, and under the same order. Still no steps were taken by *C* to make him a party. The Court, at the next term, struck out the 4th paragraph. Issues on the complaint and second paragraph of the answer. Trial and judgment for the plaintiff.
- Held*, 1. That, under the circumstances, it was not error to strike out the 4th paragraph of the answer.—*Elliott v. Stevenson*, 359
23. *Held*, 2. That *A* was a necessary party under said 4th paragraph. *Ibid*.
24. *Held*, 3. That, under the issues joined upon the trial, evidence of payments by *C*, for the use of *A*, *B* and *C*, was not admissible. *Ibid*.
25. **SUIT ON INDORSED NOTE.**—In an action upon a note, the complaint, to be sufficient, should contain an averment that the note remains unpaid.—*Lawson v. Sherra*, 363
26. **FORMER RECOVERY.**—Where the same question is at issue between the parties in two successive actions, the judgment rendered for the defendant in the first is an absolute bar to a recovery by the plaintiff in the second; but otherwise, where the questions at issue are essentially or materially different in the different actions, or under different pleadings in the same action.—*Bougher v. Scobey*, 365
27. **SAME.**—When a material question, involved in a subsequent suit, has been, under proper issues, determined in a prior action between the same parties, and such determination does not appear by the record of the judgment it may be shown by extrinsic proof. *Ibid*.
28. **PLEADING—ALIEN ENEMY.**—An answer, which avers that the defendant is informed and believes the plaintiff has been and now is engaged in, inciting, aiding, and assisting in the rebellion of the so-called *Confederate States*, against the *United States* and the Constitution and laws thereof, and has been, and now is, giving aid and comfort to the so-called *Confederate States*, is defective and demurrable, for not stating more specifically the particular acts of rebellion which the plaintiff has committed.—*Meni v. Rathbone*, 454
29. **PLEADING.**—A complaint in foreclosure is good, which avers, against the owner of the equity of redemption, that the mortgagor is indebted to the plaintiff by notes in a specified sum, which is due and unpaid, and that the mortgagor and his wife executed a mortgage to secure it, and that the mortgage was not recorded, and that the defendant purchased the equity of redemption with actual notice of the mortgage, the mortgage and notes being made parts of the complaint.—*Stevens v. Campbell*, 471

- rogatories to the jury, to be answered by them, touching certain facts, and such interrogatories are propounded without objection, and the jury retire, and the parties then further agree that the jury may return their verdict to the Clerk, in the absence of the Court and counsel, and, if their verdict should be defective, they may "be recalled, and required to make a complete finding to said interrogatories," it is too late to object to the interrogatories. *Ibid.*
15. PRACTICE—AMENDMENT.—It is too late, after verdict, to materially amend the pleadings in a cause. *Ibid.*
16. PRACTICE—NEW TRIALS.—A Court is not bound to grant a new trial, although both parties desire it. *Ibid.*
17. AMENDMENT.—On appeals from justices to the Common Pleas or Circuit Courts, it is competent for the latter Courts, under the code, § 97, to permit amendments to be made to the complaint, and to charge the party amending with the costs of the amendment only, unless the cause is delayed by reason of the amendment.—*The Indianapolis and Cincinnati R. R. Co. v. Clark*, 150
18. "EXCUSABLE NEGLECT."—As an example of what will constitute "excusable neglect," on an application to set aside a default, under § 99 of the code, the reader is referred to the opinion herein at length.—*Hays v. The Bank of the State*, 154
19. WAIVER—ESTOPPEL.—Where, in the progress of a cause, errors intervene, to which the party, against whom they are committed, has an opportunity to object, and he neglects to do so when they occur, or upon the trial, in any appropriate manner, such neglect will operate as a waiver thereof, and will estop him thereafter to avail himself of any objection based upon such errors.—*Preston v. Sandford's Adm'r*, 156
20. PRACTICE—NEW TRIAL.—Where a party asks for a new trial on the ground of newly discovered evidence, he must set forth in his bill of exceptions the testimony which was submitted below, so as to enable the Court to determine whether the result would be changed by the new testimony, or whether the testimony would be merely cumulative.—*Ruddick's Adm'r v. Ruddick's Adm'r*, 163
21. NEW TRIAL.—An application for a new trial on the ground of the misconduct of the jury, must be sustained by an affidavit showing its truth.—*Urban v. Kraigg*, 174
22. DEPOSITION—WITNESS.—Where the deposition of a witness is taken in a cause, and it is agreed by the parties that the deposition shall be read upon the trial, at all events, without reference to the presence or absence of the witness at the time of the trial, it is not error to admit the deposition in evidence, although the deponent had already been called and examined and cross-examined orally in the cause.—*Estep v. Larsh*, 183

23. **RULE 30.**—The words, "which is all the evidence given to the jury in this case," at the conclusion of a bill of exceptions, are not a compliance with Rule 30. *Ibid.*
24. **INSTRUCTIONS.**—Where several instructions are given to the jury, a party asking a new trial on the ground of alleged error in the instructions, must point out with reasonable certainty and particularity the error complained of. *Ibid.*
25. **PRACTICE—PLEAS IN ABATEMENT.**—The defence of another action pending is matter in abatement, and, as a general rule, must be pleaded before defences in bar.—*Estep v. Larsh*, 190
26. **PRACTICE—DISMISSAL.**—Under §§ 363 and 365 of the code, (2 G. & H. 216,) a plaintiff may, at any time before the jury retire, or the finding of the Court is announced, dismiss his action, without prejudice; and a defendant, who has pleaded a set-off, must, as to that, be regarded as a plaintiff, and may, therefore, in like manner, dismiss as to his set-off.—*Crain v. Hilligross*, 210
27. **EXECUTION—CLERK.**—Where, in the entry of a judgment, by agreement of the parties, it is ordered by the Court that an execution shall issue thereon, but shall not be levied of the defendant's property for a specific period, except in a certain event, it does not thereby become the duty of the Clerk to issue such execution without directions so to do from the plaintiff, his agent or attorney.—*The State ex rel., &c. v. Wilkin's Adm'r*, 216
28. **PRACTICE—FORMER RECOVERY.**—In an action to foreclose a mortgage, where the defendant, who is a non-resident of the State, appears and pleads in bar a former decree in foreclosure of the same mortgage, if it be shown by evidence that he had no notice, actual or constructive, of the pendency of the suit in which that decree was rendered, or if it appears affirmatively, or by reasonable inference, from the record of the proceedings in which that decree was rendered, that he had no such notice, then such decree will be a nullity, and will constitute no bar to the second suit.—*Woodhull v. Freeman*, 229
29. **AMENDMENT—PRACTICE.**—Amendments may be made in the complaint, with the leave of the Court, after the trial is begun, if they are only designed to make the complaint more certain and specific, and do not add a new cause of action, so as to injure the defendant if compelled to proceed.—*Landry's Adm'r v. Durham*, 232
30. **PRACTICE.**—Under a plea of total failure of consideration, a partial failure may be proved and made available. *Ibid.*
31. **CONTINUANCE.**—An affidavit for a continuance, in which the affiant can not state the names of witnesses he want, nor where they reside, or can be found, is insufficient.—*Webb v. The State*, 236

32. TENDER—PRACTICE.—It is doubtful whether proof of tender is admissible under the general denial.—*Schrader v. Wolfin*, 238
33. SPECIAL FINDING.—Where the general verdict is not materially inconsistent with the special findings of the jury, and the latter are responsive to the interrogatories, the Court should render judgment upon the verdict.—*Fromm v. Leonard*, 243
34. PRACTICE—WAIVER.—Error alleged to have been committed in sustaining a demurrer to a pleading is waived by amending the pleading.—*Patrick v. Jones*, 249
35. RULE 30.—Unless a bill of exceptions contain the words, "this was all the evidence given in the cause," the presumption that there was other evidence will not be excluded. *Ibid.*
36. INSTRUCTIONS TO JURY.—It is error for the Court to charge the jury verbally, when requested by either party to reduce its instruction to writing.—*The Toledo and Wabash Railway Co. v. Daniels*, 256
37. PLEADING—PRACTICE.—The statute which requires, that "when any pleading is founded on a written instrument, or on account, the original, or a copy thereof, must be filed with the pleading," is imperative. 2 G. & H. 104, § 78. And, if a complaint is defective in this particular, it will be demurrable, and, if not demurred to, and a verdict is rendered thereon in favor of the plaintiff, yet judgment can not be rendered in his favor over a motion in arrest, and, if neither a demurrer nor a motion in arrest is interposed, still, the error will be available in this Court. 2 G. & H. 77, § 50; *id.* 81, § 54.—*Reveal v. Conner*, 289
38. REFEREES—PRACTICE.—Where a controversy pending in Court is referred, by order of the Court, to three referees, the parties may agree to receive a report from one or more of them.—*Wright et al. v. Macey et al.*, 301
39. COMMON SCHOOL, LOCATION OF—PRACTICE.—Under the provisions of the common school law of March 11, 1861, the inhabitants of a township, or any portion of them, may petition the trustee for the location of an additional school district, or the erection of a school house, and, if the prayer of the petition is refused by him, they may appeal to the school examiner, and, if he reverse the decision of the trustee, it will be the duty of the latter to grant the prayer of said petition, and, if he still refuse, he may be compelled to do so by mandate. Acts 1861, p. 70, § 9, *et seq.*; *id.* p. 75, § 25.—*Trager, Trustee, &c. v. The State ex rel. &c.* 317
40. PRACTICE.—A motion for a new trial below, or an assignment of error in this Court, on the ground that "the Court erred in all the instructions it gave, and in refusing instructions asked for by the

- appellant," is insufficient for not pointing out, with reasonable certainty, the particular instructions in which the Court is supposed to have erred.—*Peck v. Hensley*, 344
41. NEW TRIAL—SURPRISE.—When the plaintiff, in an action, testifying in his own behalf, sustains the averment in his own complaint, where he had full knowledge of the fact, the defendant can not obtain a new trial on the ground that he was surprised by such testimony. *Ibid.*
42. SUIT ON INDORSED NOTE.—In such an action, where the complaint avers that the note was made to an unmarried woman, who afterwards married, and then with her husband indorsed the note to another person, who indorsed it to the plaintiff, and the complaint is not denied under oath, it is not necessary, on the trial, for the plaintiff to prove said marriage and indorsement, as alleged.—*Lawson v. Sherra*, 363
43. RULES OF CIRCUIT COURTS.—A rule of the Circuit Court, which requires parties desiring a change of venue to make their applications therefor at least one day before the day on which the cause is set for trial, is within the power of the Court to regulate the transaction of the business therein, and valid.—*Vail v. McKernan*, 421
44. ATTORNEY—PRACTICE.—Attorneys can not withdraw their appearance in a cause without the permission of the Court, and, if it is withdrawn, and the record on appeal is silent as to the ground of withdrawal, this Court will presume it was done upon satisfactory evidence presented to the inferior Court.—*Symmes v. Major*, 443
45. WAIVER—PRACTICE.—In an action in attachment against husband and wife, the latter being insane and over twenty-one years of age, a personal appearance by the husband, and an appearance by the wife with her husband, and also by her general guardian, waives the necessity of publication, and such facts, appearing in the record on appeal, will obviate the necessity for any evidence of publication in the record. *Ibid.*
46. PRACTICE.—It is not error to strike out a paragraph of an answer which renders necessary no other proof than was already made necessary by the previous filing of the general denial.—*Stevens v. Campbell*, 471
47. PRACTICE—AMENDMENT.—The *vis à vis* Courts may, in the exercise of a reasonable discretion, permit amended answers to be filed after previous answers have been withdrawn.—*The City of Aurora v. Cobb*, 492
48. PRACTICE.—Where several paragraphs of an answer are substantially the same in legal effect, they may all but one be stricken out

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48. PRACTICE.—Where several paragraphs of an answer are substantially the same in legal effect, they may all but one be stricken out

on motion; or, if they all amount to the general denial, where the latter is not pleaded in form, they may all but one be stricken out on motion, and, if the general denial be so pleaded, they may all be stricken out in like manner. *Ibid.*

49. PRACTICE—DEMURRER.—But the only defects in pleadings, which can be obviated by demurrer, are those indicated in section 50 of the code; and demurrers filed for causes or defects not therein indicated, should be overruled. *Ibid.*

50. PRACTICE—RIGHT TO OPEN AND CLOSE.—Where the plaintiff is required to introduce any evidence to establish his right to a judgment, or to show how much it should be beyond a mere nominal amount, he is entitled to open and close. *Ibid.*

51. SAME.—Where the defendant pleads by way of confession and avoidance, or in such other manner as to admit the plaintiff's cause of action, or, in open Court, before entering upon the trial, he admits the plaintiff's cause of action, and thus removes the necessity of any proof on his part, the defendant will be entitled to open and close. *Ibid.*

52. IMPEACHMENT OF WITNESS.—Evidence designed to impeach the general character of a witness should relate to the time when he testified, and his character at the place where he then resided, and amongst those who knew it there. *Ibid.*

53. EXAMINATION OF WITNESS.—The cross-examination of a witness should be confined to matters inquired of in his examination in chief. *Ibid.*

54. PRACTICE.—Objections to evidence, to instructions, to findings, general or special, or to special rulings or decisions of the Court, should be specific, and designate, with reasonable certainty, the grounds of the objections. *Ibid.*

PRACTICE IN SUPREME COURT.

1. PRACTICE IN SUPREME COURT.—Where the bill of exceptions states the order of events in the trial of a cause differently from the journal entry on the record of the Court, the former must govern, so far as the record in this Court is concerned.—*Carmichael v. Shiel*, 66

2. PRACTICE IN SUPREME COURT.—Where there is evidence tending to sustain the finding and judgment below, this Court will not disturb the judgment where the case is brought here upon the evidence.—*Fidler v. Fidler*, 71

3. ACTION AGAINST COUNTY TREASURER.—An action against an ex-treasurer of a county and his sureties, on his official bond, should be prosecuted in the name of the State, on the relation of the audi-

- tor of the county, and not on the relation of the acting treasurer, and, if such action be instituted on the relation of the latter officer, it will be irregular, and can not be deemed to be amended in this Court.—*Snyder v. The State, ex rel., &c.*, 77
4. SPECIAL FINDING—PRACTICE.—Where a judgment is rendered on a special finding of facts, and there is any evidence tending to establish the existence of the facts necessary to uphold the judgment in point of law, and there is nothing indicating any other error, mistake, or wrong, except mere error of opinion on evidence, the Supreme Court will not disturb the finding.—*The Bank of the State v. Wheeler*, 90
 5. PRACTICE IN SUPREME COURT.—It is too late to object, for the first time, to the form of demurrers in this Court. Objections should first be made below.—*Aiken v. Bruen*, 137
 6. PRACTICE IN SUPREME COURT—WAIVER.—This Court will not reverse a judgment, in a valid cause for any error in the proceedings below, which was waived by the party against whom it was committed.—*Preston v. Sandford's Adm'r*, 156
 7. PRESUMPTION.—Where there is nothing in the record inconsistent with such presumption, this Court will presume in favor of the action of the lower Court.—*Estep v. Larsh*, 183
 8. PRACTICE IN SUPREME COURT.—A judgment below will not be reversed by this Court where the record shows that the appellant has not been injured by the alleged error.—*Souser v. Cunningham*, 200
 9. PRACTICE—JUDGMENT—REPLEVIN.—An objection to the form of a judgment in replevin, in order to be available here, must have been first brought to the attention of the Court below in the proper manner.—*Baker v. Horsey*, 246
 10. REVERSAL.—Where the evidence tends to sustain the finding of the Court below, this Court will not reverse the judgment for alleged error in overruling a motion for a new trial on the ground of insufficient evidence.—*Austin et al. v. Willson's Executors*, 252
 11. CONTINUANCE.—Where an affidavit for a continuance is filed, but the record on appeal fails to show that any motion, based thereon, was made, or that the Court took any action in reference thereto, the alleged error in refusing a continuance will not be considered in this Court.—*Swails v. Coverdill*, 271
 12. ERROR IN ADMITTING TESTIMONY.—Where error is alleged to have been committed in the admission of testimony, it will not be available in this Court, unless the ground of objection was stated to the Court below. *Ibid.*
 13. REVERSAL FOR INSUFFICIENT EVIDENCE.—Where there is evidence which tends to sustain the finding of the Court below, this

Court will not reverse the judgment of that Court for alleged error in refusing a new trial on account of insufficiency of the evidence.
—*Gordon v. Norman*, 300

14. PRACTICE IN SUPREME COURT.—Improper evidence, if allowed to be given and not objected to below, will not be available to reverse the judgment in this Court.—*Hollowell v. Simonson*, 398
15. PRACTICE IN SUPREME COURT.—Where an appearance is entered in the inferior Court, and is never withdrawn, and an appeal is taken to this Court, and the judgment below is reversed and the cause remanded, and, after proceedings there, another appeal is taken to this Court, this Court will judicially know what attorneys have appeared in the cause.—*Symmes v. Major*, 443
16. COSTS—PRACTICE—PRESUMPTION.—In an action to recover damages for a nuisance in erecting a mill dam, and to abate the same, where the plaintiff alleged in his complaint that he was the owner in fee and in possession of the land, proof of possession alone would entitle him to recover damages, and, where, in such action, he recovered judgment for 1 dollar damages and the like amount of costs, and failed to obtain an order for the abatement of the nuisance, or show himself entitled thereto, this Court will presume in favor of the correctness of the judgment below, and that the title to the premises did not come in question.—*Barber v. Barber*, 468

PRESIDENT OF UNITED STATES.

1. PRESIDENT OF UNITED STATES—HIS POWERS IN WAR.—The President of the *United States* has a right to govern, through his military officers, by martial law, when and where the civil power is suspended by force; in all other times and places the civil excludes martial law—excludes government by the war power.—*Griffin v. Wilcox*, 370
2. HABEAS CORPUS, SUSPENSION OF WRIT OF.—Neither the President, nor the Congress, of the *United States*, can suspend the issue of the writ of *habeas corpus* by a State Court. *Ibid.*

PRINCIPAL AND SURETY.

1. PRINCIPAL AND SURETY—NOTICE.—On *May 3, 1861*, *A*, as principal, and *B* and *C*, as sureties, executed a joint promissory note to *D*, who indorsed it to *E*, who, on *August 22, 1861*, recovered judgment on it by default against *B* and *C*, process having been returned not found as to *A*. On *December 6, 1861*, *B* and *C*, in writing, notified *E* to sue *A* on the note. *E* failed to do so, but sued out his execution against *B* and *C*, who thereupon filed their complaint to enjoin the collection of the judgment of them.
Held, 1. That, the note being joint, and therefore merged in the judgment aforesaid, it is doubtful whether an action could be maintained thereon against *A*, after judgment had been taken against *B* and *C*.
—*Irwin et al. v. Helgenberg et al.*, 106

2. *Held*, 2. But, that, at all events, *E*, having, before receiving the notice, sued all the makers of the note, and recovered judgment against all on whom he could get service of process, could not be required to bring another suit before he could avail himself of that judgment, unless some equitable ground is specially shown entitling them to such relief. *Ibid.*

PROCESS—SERVICE OF.

1. **DIVORCE—SERVICE OF PROCESS.**—If a resident of this State, whilst temporarily absent, is constructively notified of the pendency of such an action, such service is void, because the same should have been made by copy of process left at his last place of residence; but, if he is a non-resident, then no personal judgment for alimony, if rendered against him, will be operative or valid, unless made so by his voluntary appearance to the action.—*Beard v. Beard*, 321

PROMISSORY NOTES.

See CONTRACTS, 4.

1. **PROMISSORY NOTES—MERGER.**—A suit and judgment upon a joint note against one promisor constitute a bar to any other suit against any other promisor, because the note is thereby merged in the judgment.—*Archer v. Heiman*, 29
2. **SAME.**—In section 16 of the act of March 11, 1861, (Acts Reg. Sess. 1861, p. 145,) the word "parties," as applied to joint notes or bills of exchange, is so construed as to embrace all the makers as one party, all the indorsers another, &c., and therefore a suit and judgment upon such joint note or bill against one maker, or one indorser, &c., would constitute a bar to any other suit against any other maker or indorser, &c. *Ibid.*
3. **PROMISSORY NOTES—LIABILITY OF INDORSERS.**—Where *A* draws a bill of exchange on *B*, (who accepts it,) payable to the order of *C*, who indorses it to *D*, and *D* indorses it back to *C*, the latter can maintain no action thereon against *D*.—*Palmer et al. v. Whitney, &c.*, 58
4. **SAME.**—But where *A* draws a bill of exchange on *B*, (who accepts it,) payable to the order of *C*, who indorses it to *D*, who indorses it back to *C*, all on the day of its date, and the latter, before its maturity, indorses it, and procures it to be discounted, on his own account, by a bank, such bank may maintain an action upon it against *D*; because, in the latter case, the transaction imports, upon its face, that the subsequent indorsement was made for the accommodation of the prior indorser, *C*. *Ibid.*
5. **SAME—NOTICE OF PROTEST.**—It is enough to bind the indorser, if the holder of a bill make diligent inquiry for the indorser. and act

upon the best information he can procure. There must be ordinary or reasonable diligence, such as men of business usually exercise when their interests depend upon obtaining correct information.

Ibid.

6. **SAME.**—Where a bank, discounting a note or bill, inquires of the person presenting it as to the residence of the indorser, and sends notice to the place named by him, this is due diligence, and sufficient to charge the indorser, though he never resided there, or had removed to another place.

Ibid.

7. **PROMISSORY NOTES—CONTRACT.**—*A* held the promissory note of *B* for 100 dollars, dated *September* 20th, 1854, due in six months. An agreement was made between *A*, of the one part, and *C*, *D* and *E*, of the other, by which the latter agreed to pay certain debts of *A*, for which *A* transferred to them certain property, including said note, of which a schedule was made, in which it was stated that the note was assigned to them without recourse on *A*. One of said assignees afterwards transferred the note to *F*, who probably knew that the assignment by *A* was without recourse. After the note was transferred to *F*, *A* indorsed it, but without consideration. Due diligence was used to collect the note of *B*:

Held, 1. That if the indorsement of the note by *A*, and the execution of the assignment, as stated in the schedule, without recourse on him, were concurrent acts, they should be construed together, as constituting but one contract, which contract, so construed, exempts *A* from further liability.—*Collier v. Mahan*, 110

9. **PROMISSORY NOTE—CONTRACT.**—A note in the form following creates a personal liability to pay on the part of the persons who sign it:

"\$25 00.

Cambridge City, July 1st, 1860.

"Six months after date, we, the subscribers, promise to pay to the order of *A*, 25 dollars, without any relief from valuation or appraisal laws, value received, on behalf of *Cambridge City Greys*.

A. B.,

C. D.,

E. F., Sect."

—*Kendall v. Morton*,

205

10. **ESTOPPEL.**—Representations, by the payer of a note, that it is valid, and he has no defence against it, made to a purchaser of such note after he has become the owner thereof, do not operate as an estoppel against the payer, nor can such representations, repeated by the purchaser thereof to any person to whom he may sell the same, have such effect in favor of such second purchaser.—*Windle v. Canaday*, 248

11. **SUIT ON INDORSED NOTE.**—In such an action, where the complaint avers that the note was made to an unmarried woman, who

afterwards married, and then with her husband indorsed the note to another person, who indorsed it to the plaintiff, and the complaint is not denied under oath, it is not necessary, on the trial, for the plaintiff to prove said marriage and indorsement as alleged.—*Lawson v. Sherra*, 363

12. PROMISSORY NOTES—WARRANTY.—The person who sells promissory notes, whether by indorsement or delivery without indorsement, warrants them to be genuine and not forgeries.—*Bell v. Cafferty*, 411

13. PROMISSORY NOTE.—The following instrument is a promissory note: "No 7. *Farmers' and Mechanics' Bank, Indianapolis, April 26th, 1855. Jacob Markle* has deposited in this bank seventy-five hundred and eighty-four dollars, payable to the order of himself, in currency, on return of this certificate. *A. May, Prest.*" Indorsed on the back: "*J. P. Drake, A. May.*"—*Drake v. Markle*, 433

14. SAME—NEGOTIABLE.—Such a note is negotiable by indorsement, under the law of *Indiana*, and the legal presumption is, that *Drake* and *May* placed their names upon it as indorsers. *Ibid.*

13. EVIDENCE—CONTRACT.—In an action upon such a note, against the indorsers, as makers or otherwise, parol evidence is inadmissible to prove that they, by their indorsements, intended to assume any other relations to the paper than those of indorsers. *Ibid.*

PROSECUTION OF CLAIMS AGAINST GOVERNMENT.

1. PROSECUTION OF CLAIMS AGAINST GOVERNMENT.—A claimant against the government has a clear right to appear, in person or by attorney, before a legislative committee, to openly and fairly present the facts and arguments upon which he relies for recovery.—*Coquillard's Adm'r v. Bears et al.*, 479

2. SAME.—But it is against public policy and unlawful to present such facts and arguments secretly, or to resort to "log rolling" or deceit, or undue means, or bribery, or other corrupting influences, in order to secure desired legislation. *Ibid.*

3. SAME—CHAMPERTY.—A contract to prosecute a claim against the government, for another person, and pay all expenses, and to receive, as compensation therefor, a certain portion of the amount recovered, if successful, and nothing if not successful, is champertous and wholly void. *Ibid.*

PROVOST MARSHAL.

1. PROVOST MARSHAL—ARREST.—A deputy Provost Marshal, directed by his superior military officer to arrest and send to headquarters all persons engaged in stealing, concealing, or preventing the de-

livery of any Government property, or any property to which the *United States* have any just claim, in any county in this State, can not, upon his own motion, and without proper legal process under the laws of *Indiana*, arrest and imprison any citizen upon suspicion that he has committed some crime; and any person so arrested and confined, may be discharged therefrom by the judge of any Court of competent jurisdiction, under the writ of *habeas corpus*.
—*Skeen v. Monkeimer*, 1

2. PROVOST MARSHAL—ARREST.—A deputy Provost Marshal, directed by his superior officer to arrest and punish persons, not connected with the army, for retailing spiritous liquors, at their usual places of doing business, to soldiers, is not protected by such order, from liability to the arrested party, for damages on account of such arrest, because such order is illegal.—*Griffin v. Wilcox*, 370

RAILROADS.

1. PLEADING—RAILROADS.—In an action for forcibly entering upon land, and digging the soil, excavating pits, making embankments, &c., an answer that the defendants entered as the servants of a specified railroad company, which had legally appropriated the injured property as the line of her road, &c., would justify the entry and bar the suit.—*Green v. Boody*, 10
2. RAILROADS—LIABILITY—EXEMPTION.—Where a person traveling on a railroad receives from the company a free pass, upon which is indorsed a statement that, "it is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company," such indorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the railroad company in running the train; and it would seem that such agreement does not cast upon such person any risks arising from any negligence of the servants of the railroad company in running trains.—*The Indiana Central Railway Co. v. Mundy*, 48
3. JURISDICTION—DAMAGES.—The Circuit Court and Courts of Common Pleas have concurrent jurisdiction in actions for the assessment of damages for lands taken by railroad companies, and where proceedings for such purpose have been commenced in one of said Courts, and appraisers appointed thereby, and an award made and returned by them, the other Court can not then deprive it of jurisdiction.—*Hughes v. The Lake Erie and Pacific R. R. Co.*, 175
4. LIABILITY FOR STOCK.—Where a railroad is kept securely fenced by the company, and the fence is destroyed by unavoidable accident, as by fire, and is repaired by the company within a reasonable time after its destruction, but before it is so repaired stock gets upon the track and is injured, the company will not be held liable therefor.—*The Toledo and Wabash Railway Co. v. Daniels*, 256

5. **RAILROADS—CONTRACT.**—Subscriptions to the capital stock of railroad companies, made since the taking effect of the act of *February* 23, 1853, authorizing the consolidation of such companies, will not be discharged or invalidated by the subsequent consolidation of the company in which they are made, but they will be held to have been made with reference to said law.—*Bish et al. v. Johnson et al.*, 299

RECOGNIZANCE.

1. **JURISDICTION—RECOGNIZANCE.**—A person, who has been indicted for felony and arrested in one county, but, by reason of the insufficiency of the jail thereof, is confined in the jail of an adjoining county, may apply, by petition for writ of *habeas corpus*, to the judge of the Court of Common Pleas of the latter county, to be there admitted to bail, and such judge may legally grant such writ, and direct the prisoner to be admitted to bail, in the penalty prescribed by the Court of the county where the indictment was found, and, if the prisoner execute such recognizance with surety, conditioned for his appearance at the next term of the proper Court, and the same be approved by the sheriff of the county in which he is so confined, such recognizance will be valid, although the day of the month on which said Court will meet may be incorrectly recited in such recognizance.—*Hunter v. The State*, 351

REFEREE.

1. **REFEREE—PRACTICE.**—Where a controversy pending in Court is referred, by order of the Court, to three referees, the parties may agree to receive a report from one or more of them.—*Wright v. Macey*, 301

RELATOR.

See TREASURER OF COUNTY, 1.

REPLEVIN.

1. **JURISDICTION—REPLEVIN.**—Actions of replevin may be instituted before any justice of the peace in the county, without reference to the fact that the defendant may reside in a different township from that in which the justice resides.—*Test v. Small*, 127
2. **REPLEVIN—PLEADING.**—It is not necessary that the answer of the defendant in replevin should claim a return of the property; but if the case made by the evidence authorizes a return, it may be awarded by the Court, after verdict.—*Matlock's Adm'r v. Straughn*, 128

 RESCISSION OF CONTRACTS.

See CONTRACTS, 20, 21.

SALES.

1. PROMISSORY NOTES—WARRANTY.—The person who sells promissory notes, whether by indorsement or delivery without indorsement, warrants them to be genuine, and not forgeries.—*Bell v. Caferty*, 411
2. CONTRACT—SALE—FRAUD.—Where a person sells personal property, and the vendee pays therefor by transferring to the vendor forged promissory notes, knowing them to be forged, such sale will not be rendered absolutely void by such fraud, but only voidable. *Ibid.*
3. CONTRACTS—RESCISSION OF.—In such case, whether the fraud amount to a crime or not, the vendor, being himself innocent, still has the right to avoid or affirm the sale, upon the discovery of the fraud, so long as the property remains in the possession of the vendee, or a purchaser from him with notice. *Ibid.*
4. SAME—SALE.—But, where there has been a sale, and delivery under it, sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the *bona fide* vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor. *Ibid.*

SCHOOLS.

1. COMMON SCHOOLS, LOCATION OF—PRACTICE.—Under the provisions of the common school law of *March 11, 1861*, the inhabitants of a township, or any portion of them, may petition the trustee for the location of an additional school district, or the erection of a school house, and, if the prayer of their petition is refused by him, they may appeal to the school examiner, and, if he reverse the decision of the trustee, it will be the duty of the latter to grant the prayer of said petition, and, if he still refuse, he may be compelled to do so by mandate. Acts 1861, p. 70, § 9, *et seq.*; *id.* p. 75, § 25.—*Trager, Trustee, &c. v. The State ex rel. &c.*, 317

SEDUCTION.

1. SEDUCTION—PLEADING.—In an action by the father against the seducer of his daughter, to recover damages, the basis of his recovery must be the loss of her service, his injured feelings, &c., and in such action, a former recovery by the daughter, in an action in her own name against her seducer, can not be pleaded in mitigation.—*Pruitt v. Cox*, 15

2. **INSTRUCTIONS TO JURY.**—In an action, where both the daughter and her alleged seducer testify and directly contradict each other, and there is testimony tending to sustain the daughter, it is error, as tending to mislead the jury, for the Court to instruct the latter, that "as to the main fact of sexual intercourse, the daughter affirms it and the defendant denies it, and if the two seem equally to claim your credence, you can not, in such case, find for the plaintiff, because, as to that fact, which is radical in the case, there is no preponderance for the plaintiff." *Ibid.*
3. **PLEADING—SEDUCTION.**—In an action by the female seduced against her seducer, to recover damages, it may be shown that the seduction was accomplished under a promise of marriage, and the facts and circumstances generally, which constituted the means of its accomplishment, may be alleged and proved.—*Lee v. Hefley*, 98
4. **SAME—INFANCY.**—In such action, the answer by the defendant, that at the time of the commission of the act, &c., he was an infant, under the age of twenty-one years, &c., constitutes no bar to the action, and is demurrable. *Ibid.*

SELF-DEFENCE.

1. **SELF-DEFENCE.**—If a man, on returning to his own house find himself barred out and excluded therefrom by another, and then repeatedly demands, and is denied admission, he has a legal right to break in the door; and if he encounter resistance on thus entering, and be first stricken by the unlawful occupant with a deadly weapon, and then, meeting force with force, he take the life of such occupant, such killing would seem to be excusable homicide, committed in self defence.—*DeForest v. The State*, 23

SHERIFF—SHERIFF'S SALES.

1. **LIEN OF JUDGMENT—SHERIFF'S SALES.**—A judgment is no lien on land, which the debtor holds by a bond, or school land certificate issued by a county auditor under the school law, conditioned for the execution of a title on payment of the purchase money, though he had taken possession and paid the money before the rendition of the judgment; and a sheriff's sale, on execution against the obligee of land so held, conveys no estate to the purchaser.—*Jeffries v. Sherburn*, 112
2. **CONTRACT—SHERIFF'S SALES—APPRAISEMENT—MERGER.**—Promissory note executed in 1840, prior to the existence of any law on the subject of appraisement in *Indiana*. Judgment was recovered thereon in 1845, after the taking effect of such a law, but the judgment was silent as to the mode of its collection, and it was not required, by any law then in force, to specify the manner of its collection. Real estate was afterwards sold on execution, without

- appraisement, to satisfy the judgment, notwithstanding the law, in force at the date of the judgment and sale, required appraisement.
- Held*, 1. That, as the law in force at the date of the contract did not require any appraisement, the plaintiff in the judgment had the constitutional right to have it collected on execution, without appraisement.—*Rawley v. Hooker*, 144
3. *Held*, 2. That the act of *February* 11, 1843, so far as it attempts, in this respect, to control the enforcement of contracts, executed before its passage, is unconstitutional and void. *Ibid.*
4. *Held*, 3. That the sale without appraisement was valid, and that it was not necessary, for direction so to sell, to be contained in the judgment. *Ibid.*
5. *Held*, 4. That the sheriff, in order to determine the proper mode of sale, may examine the record of the judgment to ascertain the date of the contract, or may ascertain the same from evidence *de hors* the record, and the same evidence will be competent to sustain the validity of the sale in any action concerning the title so acquired. *Ibid.*
6. *Held*, 5. That it is not the imperative duty of the sheriff to look behind the judgment to ascertain his duty in this respect, and he will incur no liability by neglecting to do so. *Ibid.*
7. *Held*, 6. That the contract was not merged in the judgment in such sense as to prevent a reference to it to determine the rights of the parties growing out of the contract. *Ibid.*
8. MORTGAGED CHATTELS, SALE OF.—The equity of redemption of mortgaged chattels may be sold on execution, and the sheriff is entitled, for that purpose, to levy upon and take possession of the same.—*Schrader v. Wolfen*, 238

SLANDER.

1. SLANDER.—Where the persons who hear a charge of larceny, complained of as slanderous, know the transaction referred to in the charge, know that that particular transaction is the one referred to as the ground of the charge, and know that that transaction was not larceny, no action for slander can be maintained; but, if the hearers understood the defendant to repeat the charge, without reference to the transaction as understood by them, and upon what he might assume to know beyond their knowledge, then the words might constitute a slanderous charge.—*Carmichael v. Shiel*, 66

STATUTES CONSTRUED.

- See NEW TRIALS, 1, 2, 3. BONDS, 3, 4. PLEADING, 16. TAXATION, 2.
1. CONSTITUTIONAL LAW—OFFICIAL BONDS.—The act of *December* 21, 1858, (Acts Special Session 1858, p. 39,) is applicable as well

- to official bonds executed before as after its date, and effects only the remedy, and does not impair the obligation of such contracts, and is therefore constitutional.—*Pierce v. Mills*, 27
2. **PROMISSORY NOTES—MERGER.**—In section 16 of the act of *March 11, 1861*, (Acts Reg. Sess. 1861, p. 145,) the word “parties,” as applied to joint notes or bills of exchange, is so construed as to embrace all the makers as one party, all the indorsers another, &c., and therefore a suit and judgment upon such joint note or bill against one maker, or one indorser, &c., would constitute a bar to any other suit against any other maker or indorser, &c.—*Archer v. Heiman*, 29
3. **STATUTES CONSTRUED—COSTS.**—Under section 25, 1 G. & H. p. 338, so far as the recovery of costs is concerned, a discharge upon *nolle prosequi* shall be deemed an acquittal.—*The Board, &c., of Miami Co. v. Blake*, 32
4. **SAME—“EXTRA SERVICES.”**—Under section 1 of the act of *March 11, 1861*, 2 G. & H. p. 652, “extra services” should be construed to embrace all services rendered by the officers therein named for which no compensation is given by law, and one hundred dollars is the largest amount which the county can legally allow for such extra services. *Ibid.*
5. **STATUTES CONSTRUED—EVIDENCE.**—In section 3, of the act of 1861, 2 G. & H. p. 168, the term, “confidential communications,” seems to be limited to matters confided to attorneys, physicians and clergymen, and does not include communications between husband and wife, and the right to waive objections to their disclosure, therefore, does not apply to the latter.—*Bevins v. Oline's Adm'r*, 37
6. **STATUTES CONSTRUED—MECHANIC'S LIEN.**—Under sections 647 and 648 of the code, on the subject of mechanic's liens, no lien can be acquired upon specific articles furnished for a building, as distinct from the building, but only upon the building in which they are placed, or on the land whereon they are placed, or both.—*Baylies v. Sinez*, 45
7. **PLEADING—PENDENCY OF ANOTHER ACTION.**—Under the third subsection of section 50 of the code, (2 G. & H. p. 79,) where the pendency of another action for the same cause, between the same parties, is pleaded in abatement, it is not necessary to recite the complaint in the former suit, or to aver that such action is still pending, because it is sufficient, to abate the second action, to show that the first action was pending at the time the second action was commenced.—*Lee v. Hefley*, 98
8. **STATUTES CONSTRUED—EXECUTION.**—Section 527 of the code, (2 G. & H. p. 264,) must be so construed as to require that the time during which a party to a judgment may be restrained from pro-

- ceeding to collect it, by agreement of the parties entered of record, shall be certain and fixed, and not uncertain or determinable by future events. Public policy requires that the public records should afford definite and certain information as to the incumbrances upon real estate.—*Ristine et al. v. Early et al.*, 103
9. MARRIED WOMEN, PROPERTY OF.—Section 5 (1 G. & H. p. 374,) includes lands which the wife may acquire by purchase, as well as in other modes.—*Johnson v. Runyon et al.*, 115
10. SAME.—Personal property acquired by a married woman, with the profits of her real estate, does not become the property of her husband by being left in his possession and use, and a sale of it on execution, for the payment of his debts, would not divest her title, or convey any title to the purchaser. *Ibid.*
11. DISCONTINUANCE—SPECIAL JUDGE.—When, under the provisions of sections 207 and 208 of the code, (2 G. & H. p. 154,) a judge, other than the regular judge of the Court, is called in by the regular judge, to try causes which he is incompetent to try, and such other judge fails to appear at the time designated for the trial of such causes, they are not thereby discontinued, but should be passed to, and continued upon, the general docket of the causes pending in said Court.—*Singleton v. Pidgeon*, 118
12. WITNESS—STATUTES CONSTRUED.—Where a part of the estate of an intestate is the promissory note of A, and the whole estate is appraised at less than 300 dollars, and is therefore under the provisions of the Decedent's Estates' Act, delivered to his widow, and she sues A on said note, who pleads defences going to the merits, A is not rendered an incompetent witness in his own behalf by the terms of the last proviso of section 3, of the act of March 11, 1861, (2 G. & H. p. 168).—*Walker v. Clifford*, 123
13. WITNESS—STATUTES CONSTRUED.—Where a mortgagor dies and the mortgagee sues the heirs and administrator of the mortgagor to foreclose the mortgage, and defences are interposed by the heirs, the mortgagee, under the provisions of the last proviso of the third section of the act of March 11, 1861, (2 G. & H. p. 168,) is a competent witness in his own behalf.—*Newkirk v. Burson*, 129
14. "BANK BILLS"—"BANK NOTES."—The terms, "bank bills" and "bank notes," are synonymous in their popular sense, and, under §§ 48 and 49, 2 G. & H. 403, they must be held to be identical in their legal signification.—*The State v. Hays*, 176
15. CHANGE OF VENUE.—The act of March 17, 1861, (see acts 1861, p. 49,) is construed to require the party, to whom a change of venue is granted, to perfect the same within the time therein limited, and to pay all costs of such change, if perfected, and to pay all costs up to the time when it should have been perfected, if it is not; but,

- in any event, such change must be perfected within a reasonable time after the order, or the right thereto will be deemed to have been waived, and the cause will remain upon the docket as if no change had been granted.—*Howard v. Barbee*, 221
16. LIMITATIONS.—Where infant wards, soon after the appointment of their guardians, remove from this State, and continue to reside abroad, the statute of limitations does not run against them until they return. 2 G. & H. 161, § 216.—*Smith v. Wiley*, 224
17. STATUTES CONSTRUED—CONSTITUTIONAL LAW.—The act of Congress of March 3d, 1863, assuming to indemnify against certain arrests, is unconstitutional.—*Griffin v. Wilcox*, 370
18. TREASURER'S FEES—STATUTES CONSTRUED.—The treasurer of a county is entitled to five per cent. as commissions, only on the amount he may collect on the delinquent list, to be furnished him by the auditor, after his March settlement with the auditor, and before he receives the duplicate for the next year.—*The Board, &c., of Grant Co. v. Miles*, 438
19. SAME.—For the amount of taxes collected on his duplicate, as well delinquent as current, after he receives said duplicate, and before he makes his March settlement, his compensation is regulated by the act of June 4, 1861. Acts special session, 1861, p. 41. *Ibid.*
20. FALLS PILOTS—STATUTES CONSTRUED.—The law of Indiana, "regulating the licensing of pilots at the Falls of the Ohio," &c., is valid, at least so far as commercial intercourse may be carried on between the parts of said State named in said act, by citizens of said State. 1 G. & H. 473.—*Barnaby v. The State*. 450

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS—CONTRACT.—A contract whereby A sold a horse to B, and warranted that it should be sound for one year thereafter, and agreed, that, if, after the expiration of one year, the horse should prove unsound, he would take it back and pay the plaintiff 100 dollars, is within the statute of frauds, and not operative against A, unless in writing. 1 G. & H. 348, 5th subsection of sec. 1.—*Shipley v. Patton's Adm'r*, 169

SURETY.

See PRINCIPAL AND SURETY.

TAXATION.

1. BANK STOCK—TAXATION.—Under the charter of the city of Madison, bank stocks should be assessed, for municipal taxation, in the names of the individual stockholders, and not in the name of the bank.—*The City of Madison v. Whitney, &c.*, 261

2. **SAME—STATUTES CONSTRUED.**—The act of 1861, providing for the taxation of bank stocks against the banks, and not the stockholders, only applies to the taxation for State and county purposes, and not to taxation for municipal purposes. 1 G. & H. 17. *Ibid.*
3. **SAME.**—*Semble*, that municipal corporations can not tax bank stock owned by non-residents of the city, because such stock can have no location or *situs* other than the domicile of the owner. *Ibid.*
4. **SAME—UNITED STATES STOCKS.**—*Semble*, also, that the bonds and stocks of the *United States* can not be taxed under State authority. *Ibid.*
5. **SAME.**—But, *quære*, whether a bank, organized under the general banking law of *Indiana*, can legally divert her capital from the business for which the corporation was created, and invest it in *United States* stocks, and thus deprive the State of any revenue therefrom. *Ibid.*
6. **CITY OF MADISON—TAXATION.**—Under the charter of the city of *Madison*, pork, owned by non-residents of the city, which had been brought to said city by them, to be slaughtered, cured and stored there, subject to their order, will be liable to municipal taxation whilst it remains in said city, and it will be the duty of the person, in whose possession it is, to furnish a list thereof for taxation in his name.—*Powell v. The City of Madison*, 335
7. **SAME.**—Under the provisions of said charter, where a person is called upon by the assessor to furnish such list, and he prepares and delivers it to the officer, but the officer, whose duty it is to swear him thereto, neglects to do so, such oath will be thereby waived, and the officer will have no right himself to make such list, on the ground that such person had either neglected or refused so to do, nor, in any such case, would the common council of said city have any authority to order that additional property be placed upon said list; but such list, when deemed imperfect or dishonest, should be corrected in the mode prescribed in section 10 of the amendments to said charter. *Ibid.*
8. **TAXATION OF PERSONALTY.**—Personal property, which exists in a substantial and corporal form, such as cured pork, &c., must have an actual *situs*, and is taxable wherever that *situs* is; but it seems that personal property of an intangible character, which exists in rights of action, such as debts, bank stocks, &c., has no *situs*, other than the domicile of the owner, and is therefore only taxable at the place of his residence. *Ibid.*
9. **TAXATION—CONSTRUCTION.**—The provisions of a municipal charter, in reference to the mode of assessing and collecting taxes, must be substantially pursued, or the tax will be invalid, and can not be legally collected. *Ibid.*

TAXES—TAX COLLECTOR.

1. **PAYMENT OF TAXES.**—The payment of taxes, in an illegal and void currency, is a nullity, and the tax collector might, notwithstanding such payment, proceed to collect them as in other cases.—*Richards, &c. v. Stogsdell et al.*, 74
2. **SAME—ACTION.**—But the tax collector does not, by reason of a void payment to him of taxes on his duplicate, acquire any personal right of action against the person making such payment, for the recovery of the amount of taxes so attempted to be paid. *Ibid.*
3. **SAME.**—A tax collector, in order to avail himself of the remedy given him by section 193, 1 R. S., 1852, p. 145, must proceed within the time limited in said section. *Ibid.*

TENDER.

1. **TENDER.**—A tender, sufficient to discharge a contract, must be so complete and perfect as to vest the absolute property in the person to whom it is tendered.—*Schrader v. Wolfen*, 238
2. **TENDER—TIME OF.**—Where the time and place of delivery are fixed by the contract, a tender of the property to be delivered, to be valid, must be made a reasonable time before sunset on the given day, and must be continued until that time, unless the party who is to receive the property tendered appear sooner, and, if he be present, a tender to him at any time on the day is good.—*Larimore v. Hornbaker*, 430

TERMS OF COURTS.

1. **TERMS OF COURTS.**—Where the term of a Circuit Court begins on the 20th day of *October*, and may continue two weeks, if the business requires it, but in fact continues only one week, and the term of the Common Pleas Court, for the same county, begins on the 27th day of *October*, and is in fact begun on that day, it can not be objected to the validity of the latter term that it was holden during the term of the Circuit Court.—*Swails v. Coverdill*, 271

TREASURER OF COUNTY.

See FEES, 1, 2.

1. **ACTION AGAINST COUNTY TREASURER.**—An action against an ex-treasurer of a county and his sureties, on his official bond, should be prosecuted in the name of the State, on the relation of the auditor of the county, and not on the relation of the acting treasurer, and, if such action be instituted on the relation of the latter officer, it will be irregular, and can not be deemed to be amended in this Court.—*Snyder v. The State ex rel., &c.*, 77

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TRESPASS.

See JURISDICTION, 6.

TRUSTEE.

1. TRUSTEE—VENDORS AND PURCHASERS.—The purchase, by a trustee, of trust property, is not void, but may be avoided by the *cestui que trust*, within a reasonable time, by a direct proceeding for that purpose, but such avoidance can not be effected at the suit of a third person.—*Rice et al. v. Cleghorn et al.* ✓ 80

USURY.

1. USURY.—Usury may exist where there is no loan of money; or where a money debt is created and forborne; or where the original contract by which a debt is created is for the purchase and sale of land, it may be usury for the vendor to demand and receive more than legal interest for the forbearance of such debt.—*Newkirk v. Burson*, 129

VACATION OF OFFICE.

1. VACATION OF OFFICE.—An office may be vacated by abandonment, or resigned by parol, and the existence of a vacancy in either case will depend upon all the facts and circumstances attending the same.—*The State, &c. v. Allen*, 516
2. VACATION OF OFFICE.—Any voluntary act of such officer, which permanently disables him to perform the duties of his office, such as enlistment in the military service of the *United States*, in the war for the suppression of the present rebellion, will amount to a constructive resignation of his office by abandonment. *Ibid.*

VENDORS AND PURCHASERS.

See EXECUTORS AND ADMINISTRATORS, 1, 2. SHERIFF, 1.

1. TRUSTEE—VENDORS AND PURCHASERS.—The purchase, by a trustee, of trust property, is not void, but may be avoided by the *cestui que trust*, within a reasonable time, by a direct proceeding for that purpose, but such avoidance can not be effected at the suit of a third person.—*Rice et al. v. Cleghorn et al.*, ✓ 80
3. EXECUTORS AND ADMINISTRATORS—SALES OF REAL ESTATE BY.—*A*, on August 13, 1850, caused the real estate owned by *B*, at his death, to be inventoried and appraised by competent persons, selected by him, who were first sworn, as required by law. *A* was, on the next day, duly appointed guardian of the heir at law of *B*, deceased, and gave bond and took the oath of office; and, on the latter day, filed his petition in the Probate Court, alleging the death of *B*, leaving a widow, and the heir at law aforesaid, and that after the

death of *B*, he married the widow, who has since died intestate, and that no administration was ever granted on *B*'s estate, and that said estate is indebted to him in a large sum, and that he also expended a large sum in the support and education of his said ward, and that *B* left no personal property, but did leave the real estate inventoried and appraised as aforesaid, which it will be necessary to sell to pay the debts against his estate, &c., and for the maintenance and education of his said ward, and he filed the said inventory and appraisement with his petition. The prayer of the petition was, that *A* be appointed administrator of said estate, and for an order to sell the real estate aforesaid at private sale, and that his ward be summoned, &c. The petition was verified. The Court thereupon appointed *A* administrator, and he was duly qualified as such. It was then shown that his ward was a non-resident of the State, and it was then ordered by the Court that he be notified of the pendency of the petition by publication, which was done. At the next term of said Court, the ward, failing to appear, was defaulted, and a guardian *ad litem* appointed for him, who answered. At the *February* term, in 1851, before any further proceedings were had, *A* was removed by the Court, upon the application of another creditor, and his letters of administration were annulled. *C* was then appointed administrator *de bonis non* of the estate of *B*, and filed his additional bond, as required prior to the sale of real estate, and then the Court, upon the original petition of *A*, ordered the real estate to be sold, at private sale, for the purposes therein indicated, and on terms prescribed by the Court. At the *August* term of said Court, in 1851, said administrator *de bonis non* reported that he had sold said real estate to *A*, for more than its appraised value, on the terms prescribed, and *A*, waiving the credit, paid the purchase-money, and the sale was duly reported to, and confirmed by, the Court, and a proper conveyance was executed and delivered to him therefor. The sale thus made was afterwards alleged to be invalid, amongst other reasons, because, when the petition for the sale was filed by *A*, he had not been appointed administrator, and the appraisers were selected by *A*, and the appraisement made before his appointment.

Held, That, under sections 27 and 28, (R. S. 1843, p. 455,) the sale so made was valid. *Ibid*.

3. VOLUNTARY CONVEYANCE.—A voluntary conveyance is good against a subsequent grantee with notice, and especially where the voluntary grantee has conveyed to a *bona fide* purchaser.—*Aiken v. Bruen*, 137
4. CONSIDERATION—PRE-EXISTING DEBT.—A pre-existing debt is a valuable consideration to support a conveyance. *Ibid*.
5. MORTGAGE SALE BY STATE—CONTRACT.—Where the Auditor and Treasurer of State, on a Saline Fund mortgage, on which the mort-

gagor, and the persons holding under him, have failed to pay the interest, offer the mortgaged property for sale, for the collection of a larger sum than the amount actually due upon the mortgage debt, at the date of the sale, and no person offers to purchase the property at the excessive price demanded, and the same is therefore purchased by the State, at such excessive price, the sale so made to the State will be void, by reason of such excess, and a subsequent sale thereof, by the State to another person, will also be void, because the State, by her purchase, having acquired no title, can transmit none.—*Vail v. McKernan*, 421

6. NOTICE—ADVERSE POSSESSION.—Where, at the time an interest is acquired in real estate by one person, it is in the actual possession and use of another, under a claim of title, the person acquiring such interest should take notice thereof, and make inquiry.—*Ment v. Rathbone*, 454
7. NOTICE—REGISTRY.—The record of a conveyance, which was not recorded within the period prescribed by law, but was recorded thereafter, would constitute notice to all purchasers after the conveyance was so placed upon the record. *Ibid.*

VENUE—CHANGE OF.

1. PRACTICE—CHANGE OF VENUE.—It is too late, to apply for a change of venue after the trial has been commenced.—*Ickes v. Kelley*, 72
2. STATUTES CONSTRUED.—The act of March 7, 1861, (see acts 1861, p. 49,) is construed to require the party, to whom a change of venue is granted, to perfect the same within the time therein limited, and to pay all costs of such change, if perfected, and to pay all costs up to the time when it should have been perfected, if it is not; but, in any event, such change must be perfected within a reasonable time after the order, or the right thereto will be deemed to have been waived, and the cause will remain upon the docket as if no change had been granted.—*Howard v. Barbee*, 221

VOLUNTARY CONVEYANCES.

1. VOLUNTARY CONVEYANCE.—A voluntary conveyance is good against a subsequent grantee with notice, and especially where the voluntary grantee has conveyed to a *bona fide* purchaser.—*Aiken v. Bruen*, 137

WAIVER.

1. DISCONTINUANCE—WAIVER.—An appearance, after a discontinuance, waives it; and the taking of final judgment for the unan-

swered part of a cause of action, at any time during the term, will prevent a discontinuance, if such judgment be taken before the entry of judgment of discontinuance.—*McDeugle v. Gates*, 65

2. PRACTICE—WAIVER.—Where a party amends, after a demurrer to his pleading has been sustained, he waives all error in the action of the Court upon the demurrer.—*Aiken v. Bruen*, 137
3. WAIVER—ESTOPPEL.—Where, in the progress of a cause, errors intervene, to which the party, against whom they are committed, has an opportunity to object, and he neglects to do so when they occur, or upon the trial, in any appropriate manner, such neglect will operate as a waiver thereof, and will estop him thereafter to avail himself of any objection based upon such errors.—*Preston v. Sandford's Adm'r*, 156
4. PRACTICE—WAIVER.—Error alleged to have been committed in sustaining a demurrer to a pleading is waived by amending the pleading.—*Patrick v. Jones*, 249

WARRANTY.

See SALES.

WIDOW.

1. EXECUTORS AND ADMINISTRATORS—WIDOW.—*A* executed a mortgage on his land to *B*, in which his wife joined, to secure the payment of a debt. *A* died since the taking effect of the code of 1852, his wife him surviving, and said debt remaining unpaid. *C* became administrator of his estate, and there came into his hands, as such, assets sufficient to pay the expenses of administration, the expenses of the intestate's last illness, and funeral expenses, and said mortgage debt. But he failed to pay the mortgage debt, and suffered the mortgage to be foreclosed, and the property to be sold to pay said debt, and applied said assets to the payment of other debts not liens on the real estate.
Held, 1, That it was the duty of the administrator to pay said mortgage debt out of said assets, and that his neglect to do so constituted a breach of his official bond.—*The State ex rel. Lockhart v. Mason*, 172
2. *Held*, 2. That the widow of *A* had a right to have said assets applied in payment of said debt before the payment of general debts, and was damaged by the failure of the administrator so to apply it, and for such damage, she had a right of action against him and his sureties on his official bond. *Ibid*.
3. *Held*, 3. That, so far as a widow takes by descent from her husband, under the provisions of chapter 46, 1 G. & H. 291, she takes also as his heir, and, therefore, she may, under section 162, 2 G. &

H. 529, maintain an action against an executor or administrator on his bond. *Ibid.*

WIFE.

See HUSBAND AND WIFE.

WILL.

1. WILL.—On *January 23, 1860*, *A* sold to *B* a tract of land for 800 dollars, of which 200 dollars were paid at the date of sale, and the balance was agreed to be paid in annual installments of 100 dollars each, and was to be secured by notes, and a mortgage on the land. *A* executed a deed to *B* for the land, and delivered it to a third person, as an escrow, to be given to *B* on his execution and delivery of the notes and mortgage. On *May 29, 1860*, *A* died, and by his will, executed the day before his death, he devised to his wife, *C*, and to his daughter, *D*, a certain town lot, being all the real estate he then owned, except such interest as he then had in the land sold as aforesaid. He also devised to his wife, *C*, the proceeds of all debts due him, after the payment of his debts, and to *E* and *F* all other lands which he then owned. On *January 8, 1861*, administration, with the will annexed, was granted to *G*, on the estate of *A*, and the notes and mortgage aforesaid were then executed and delivered by *B* to such administrator. *E* and *F* claim the notes, under the will.

Held, That *E* and *F* take nothing under the provisions of the will, because, by the sale of said land as aforesaid, the estate of the vendor therein was converted into a money fund, which went to the personal representative, and the residue, after the payment of debts, would belong to *C*, the widow, under the will.—*Cooper et al. v. Cooper et al.*, 124

WITNESS.

1. WITNESS—STATUTES CONSTRUED.—Where a part of the estate of an intestate is the promissory note of *A*, and the whole estate is appraised at less than 300 dollars, and is therefore under the provisions of the Decedent's Estates' Act, delivered to his widow, and she sues *A* on said note, who pleads defences going to the merits, *A* is not rendered an incompetent witness in his own behalf by the terms of the last proviso of section 3, of the act of *March 11, 1861*, (2 G. & H. p. 168).—*Walker v. Clifford*, 123
2. WITNESS—STATUTES CONSTRUED.—Where a mortgagor dies and the mortgagee sues the heirs and administrator of the mortgagor to foreclose the mortgage, and defences are interposed by the heirs, the mortgagee, under the provisions of the last proviso of the third section of the act of *March 11, 1861*, (2 G. & H. p. 168,) is a competent witness in his own behalf.—*Newkirk v. Burson*, 129

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3. WITNESS—HUSBAND AND WIFE.—Where the husband and wife are both parties to an action, but the subject matter in controversy is claimed by the wife, and, under the issues in the cause, the husband discloses no such interest as would render him a competent witness in his own behalf, his testimony ought not to be admitted.—*Hollowell v. Simonson*, 398
4. WITNESS—HUSBAND AND WIFE.—As to the admissibility of the testimony of the husband in a case in which he and his wife are both parties, and she claims an interest in the subject matter in controversy, under a given state of the pleadings and evidence, the reader is referred to the latter part of the opinion.—*Meni v. Rathbone*, 454

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